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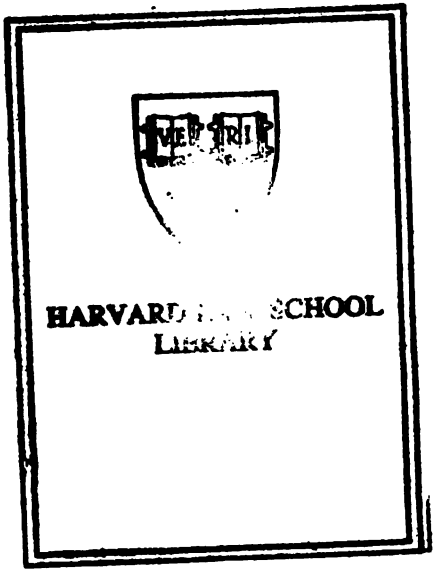

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MINNESOTA REPORTS

VOL. 117

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

JANUARY 26—MAY 24, 1912

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

(117 M.)

MAR 8 1913

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OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

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Hon. GEORGE L. BUNN
Hon. PHILIP E. BROWN
Hon. ANDREW HOLT

IRVING A. CASWELL, Esq., Clerk

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.

Pursuant to R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume preceding the case on page 199, and the cases on pages 519 to 523, are from the October, 1911, term calendar. The other cases are from the April, 1912, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

The footnotes in the present volume which are preceded by the word "[Note]" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

ORIN DANIELS v. COUNTY OF POLK.[1]

January 26, 1912.

Nos. 17,375—(198).

Cost of keeping prisoners — liability of foreign county.

Where prisoners are confined in a county jail other than in the county in which their offense was committed, under the statute in such cases provided, the county in which the offense was committed is solely liable for the cost and expense incident to such confinement.

Same — action by sheriff.

Where expense is incurred by the sheriff of the county having charge of the prisoners, not specifically fixed and provided for by section 5474, R. L. 1905, a claim therefor must be presented to the other county for allowance, and the sheriff cannot maintain an action against his own county therefor.

Action in the district court by the sheriff of Polk county to recover $596.50, expenses incurred in transportation of eleven prisoners in obedience to writs of habeas corpus issued from the United States District Court for the district of Minnesota. From an order,

[1]Reported in 134 N. W. 290.

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Watts, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Affirmed.

W. E. Rowe, for appellant.

Eric O. Hagen, for respondent.

BROWN, J.

Appeal from an order sustaining a general demurrer to plaintiff's complaint.

The short facts are as follows: Plaintiff is the sheriff of Polk county, and as such the keeper of the common jail therein. In October, 1909, certain persons were arrested under warrants issued by a justice of the peace of Mahnomen county, charging them with the wilful destruction of property, who, for want of a jail in that county, were, under the statutes in such cases provided, duly committed to the common jail of Polk county for safe-keeping, to await the action of the grand jury. Plaintiff, as sheriff, duly received the prisoners, and thereafter confined them in his jail as required by law. During their confinement in said jail certain writs of habeas corpus were sued out of and from the United States District Court for the district of Minnesota, commanding plaintiff to produce the prisoners before the court on a day named at the city of Duluth, then and there to be dealt with according to the law. Plaintiff complied with the writs, and in doing so incurred certain expenses in the transportation of the prisoners, amounting in the aggregate to $590. He presented a claim therefor to the board of commissioners of Polk county, and it was disallowed. He thereafter brought this action to recover the same, and the court below held, in sustaining the demurrer to his complaint, that the county of Polk was not liable; that plaintiff's remedy was against Mahnomen county.

We are of the opinion, and so hold, that the court below properly sustained the demurrer.

Section 5474, R. L. 1905, disposes of the question whether Polk or Mahnomen county is liable for expenditures of this character adversely to plaintiff's contention. That statute provides that, whenever any prisoner is ordered confined in a county other than that in which his offense was committed, the sheriff of such county shall keep him

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at the expense of the county sending him. It further provides that the sheriff shall collect from the sending county specified amounts for each prisoner per day, and in addition thereto such sum as shall necessarily have been paid out for clothing, bedding, and medical aid for the prisoners. The same section also provides that the board of county commissioners of the county so sending the prisoners shall, at their first session after their commitment, authorize the auditor of their county to issue to the sheriff of the other county orders upon the treasurer for the payment of the expense so incurred.

There can be no question that the legislature intended by this statute to impose upon the sending county all expenses necessarily incident to the care, custody, and maintenance of the prisoners so confined, and to relieve entirely the other county from the payment of any part thereof. In fact, counsel for plaintiff conceded in his brief that Mahnomen county was ultimately liable, but insisted that the liability exists in favor of Polk county, and not in favor of the sheriff. This, of course, assumes that the receiving county in such cases will pay all such expenses, and subsequently present a claim therefor to the sending county. This, probably, is the proper practice in so far as concerns the amounts expressly prescribed by section 5474 for the board of the prisoners.

But it is far from clear that the legislature so intended as respects unliquidated expenditures, such as for clothing and medical aid to the confined prisoners, or expenses like those incurred in the case at bar. If, as to such claims, the receiving county may determine the necessity and value of services so rendered, the sending county is afforded no opportunity to be heard upon the question, but must of necessity pay, because the other county has previously determined the amount and propriety of the charge. If the legislature intended by the statute to provide for the allowance by one county board of claims properly chargeable to another, it should have been expressed in some clearer language than that now found in the statutes pertinent to the subject. To avoid a situation of this kind, it must be held that claims of this character, the amount of which is not expressly directed by law to be paid, must be presented to and acted upon by the county from which the prisoners are committed, and that no liability what-

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ever attaches to the county in which they are confined. This may, perhaps, cast an extra burden upon the sheriff in the collection of such claims; but it is one attached to the office, and of inconvenience only. The sending county is liable to him, as sheriff, for his legal charges, and he may enforce the claim in the manner prescribed by law for the enforcement of like claims.

By this procedure the county chargeable with payment is afforded an opportunity of determining whether the expenditures made are proper and necessary, and a legal charge against the county, and not leave its liability dependent upon the adjudication of a county board not chargeable with payment, and under no responsibility in respect to the same.

Order affirmed.

THOMAS B. C. EVANS v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

January 26, 1912.

Nos. 17,391—(205).

Railroad right of way — cases followed.

The facts in this case are substantially like those presented in McCarthy v. St. Paul, M. & M. Ry. Co. 31 Minn. 278, and Radke v. Minneapolis & St. Louis Ry. Co. 41 Minn. 350, wherein it was held that the conveyance of a railroad right of way after the construction of the roadbed was in effect a grant and license to maintain the roadbed as then existing, and the decisions there rendered are followed and applied.

Same — parol evidence inadmissible to vary terms of conveyance.

An alleged contemporaneous verbal agreement on the part of the railroad company, at the time of the execution and delivery of such conveyance, to reconstruct its roadbed so as to restore to its natural condition a stream of water thereby obstructed, *held* inadmissible, as varying the terms of the written contract.

[1]Reported in 134 N. W. 294.

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Action in the district court for Clay county to recover $1,500 for the alleged wrongful obstruction of Buffalo river by defendant's embankment and for failing to place suitable culverts for the purpose of draining surface water from plaintiff's land. The amended answer denied any knowledge as to plaintiff's possession of any portion of the premises described in the complaint, but alleged that defendant owned two strips of land across them; one being two hundred feet wide and the other four hundred feet wide, which was formerly occupied by defendant's main line but now used by a spur track; that the two hundred foot strip was by warranty deed on or about July 22, 1907, conveyed to defendant by plaintiff, the consideration named in the deed being $880; that prior to the delivery of the deed an embankment had been constructed which diverted the water of Buffalo river from its previous channel. The reply was a general denial. The action was tried before Taylor, J., who, at the close of the trial, directed a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Charles S. Marden and *W. B. Douglas,* for appellant.

C. W. Bunn and *George Hoke,* for respondent.

BROWN, J.

Plaintiff was the owner of the northwest quarter of section 12, in township 139, of range 46, in Clay county, which adjoined a tract of four hundred eighty acres owned by his father, and the whole was used and occupied as one farm. Buffalo river, a small stream, flowed from a southeasterly direction toward the northwest, passing over the land immediately south of plaintiff's tract, which was owned by his father, crossing the south line of plaintiff's land some distance from the southeast corner thereof running thence on a curve or bend in a westerly direction about five hundred feet, when it turned south and recrossed plaintiff's said south line, so that the river flowed for this short distance in the form of a bend or loop through plaintiff's land, and served as a watering place for his stock. For many years prior to 1906, defendant's line of railroad extended across plaintiff's said land in a northwesterly direction, but some distance north of the arm or bend of the river mentioned. During that year the company,

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for the purposes of straightening its line and avoiding certain grades, changed the line to a point a considerable distance south of the old line. As so changed the line ran just south of the river as located upon plaintiff's land, and the grade thereof cut through the arm thereof, diverting the flow of water therefrom. A trench was constructed from the stream as it flowed north to the stream as it immediately to the west flowed south, leaving the loop or arm wholly disconnected, but returning the water to the bed of the river at the point intersected by the trench, all upon the right of way. In April, 1907, the new road embankment was approximately eighteen feet high and forty feet wide, and completely obstructed the flow of water to the north, where it had formerly flowed.

In the meantime condemnation proceedings were commenced for the purpose of acquiring the right of way at the new location, and the assessment of damages therefor. At a hearing in these proceedings, had before the district court of Clay county, a compromise and settlement of the rights of the parties was reached, by which, and as as a result of which, plaintiff conveyed to the company a strip of land over and across his farm, and the company agreed to and did pay him therefor the sum of $880, upon which payment plaintiff signed and delivered to defendant a voucher or release, by which he acknowledged the receipt of the money as and for "all damages by reason of the location, construction, and operation of said railway across" his land. The deed was the usual short form of warranty deed. At the time of the execution of the deed and the receipt of the consideration the roadbed had been fully constructed and then existed as heretofore stated, and plaintiff then well knew and understood that the construction thereof diverted the flow of the water of the river from his land. The deed was so executed and receipt given in completion of the settlement, in July, 1907.

Plaintiff brought his action in April, 1911, claiming damages (1) for the alleged wrongful and unlawful obstruction of the river by the railroad embankment; and (2) damages for the failure of defendant to place in its roadbed suitable culverts to drain the surface water from plaintiff's land.

On the trial below it was claimed by plaintiff that at the time of

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the compromise and settlement and the execution of the right of way deed defendant verbally agreed, as a part of the consideration for the deed, by constructing a proper culvert in the embankment, to restore the flow of water to the original channel and through plaintiff's land. Evidence tending to show this verbal agreement was excluded, as contradicting and impeaching the written contract as evidenced by the deed and written receipt. The court at the conclusion of the trial directed a verdict for defendant, and plaintiff appealed from an order denying his motion for a new trial.

The assignments of error present two questions: (1) Whether the court below erred in holding that the compromise and settlement, culminating in the right of way deed and payment of damages, operated as a grant and a license to maintain the road and embankment as then existing over and across the river, completely obstructing the same; and (2) whether the court erred in excluding the evidence offered by plaintiff tending to show an agreement by defendant, entered into at the time the deed was executed and as a part of that transaction, to construct a culvert in its roadbed at the river and restore the flow of water upon plaintiff's land.

1. A full consideration of the first question, and the argument of counsel for plaintiff in support of the contention that the trial court erred in resolving it against plaintiff, leads to the conclusion that the cases of McCarthy v. St. Paul, M. & M. Ry. Co. 31 Minn. 278, 17 N. W. 616, and Radke v. Minneapolis & St. Louis Ry. Co. 41 Minn. 350, 43 N. W. 6, are controlling and sustain the view and ruling of the trial court.

In the McCarthy case it appeared that the railroad company had entered upon the premises of a landowner, and located its line thereon, and had graded its roadbed over and across the same in such manner as to obstruct the natural flow of water therefrom, without having first acquired the right by condemnation proceedings or otherwise. It subsequently constructed its road upon this embankment and roadbed, and for several years operated its trains thereon. Thereafter, in negotiations for a settlement with the landowner, the company purchased of him the land so taken, and he, for a consideration agreed upon, conveyed the same by warranty deed to the company. It was

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held that the effect of the deed was a grant of the land and a license to maintain the road and embankment as then constructed and existing. The decision there rendered was followed and applied in the Radke case, upon substantially the same facts. We are unable, from the standpoint of substance, to distinguish the case at bar from those cited.

Nor can we concur with counsel in the contention that the doctrine of those cases is not only harsh, but unsound on principle. The decisions have stood the test for many years, have been cited with approval by other courts (2 Notes to Minn. Cases, 504), and in this state have become a rule of property, and should not be disturbed.

The fact that the embankments involved in these cases affected the natural drainage, and did not, as in the case at bar, obstruct the flow of water of a natural stream, is not a differentiating circumstance. Nor is the rule of the McCarthy case any the less applicable because of the fact that the actual obstruction of the stream by the roadbed was upon the adjoining land. It was within one hundred feet of plaintiff's south line, actually and completely shut off the stream from the time of its construction, and plaintiff was fully informed of the situation when he entered into the settlement. In short, with the railroad embankment constructed, the flow of water thereby obstructed, the obstruction being within a very short distance of plaintiff's land, upon land used in connection with his farm, the settlement was effected, the deed given, the consideration paid, and the release signed. In the light of this situation, we find no sound reason for distinguishing the case from the former decisions.

The case of Jungblum v. Minneapolis, N. U. & S. W. Ry. Co. 70 Minn. 153, 72 N. W. 971, for reasons stated in that opinion, is clearly distinguishable. In that case the railroad embankment had not been constructed when the deed was given. In the case at bar it had. And the situation was open and within the contemplation of the contracting parties in entering into the settlement.

2. The further contention that the trial court erred in excluding evidence offered by plaintiff to show the alleged parol agreement to restore the channel of the stream does not require extended discussion.

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We are clear that the trial court correctly excluded the evidence. To have received it would not only have varied the terms of the written contract, but in fact have destroyed the legal effect of the settlement as evidenced by the deed and release. The alleged agreement was entered into, if at all, at the time of the settlement, and as a part of that transaction, and should have been embodied in the written contract. Bruns v. Schreiber, 43 Minn. 468, 471, 45 N. W. 861.

The facts do not bring the case within Jordan v. White, 20 Minn. 77 (91), cited and relied upon by plaintiff. The agreement there shown and held admissible had reference to the money consideration agreed to be paid for the property, and not to an independent agreement on the part of the grantee to do some act beneficial to the grantor. The special agreement to reconstruct the roadbed and restore the channel of the stream comes within the rule stated in Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L.R.A.(N.S.) 492, and was properly excluded. See also cases cited in that opinion.

For the reasons stated, our conclusions are in harmony with those of the learned trial court, and the order appealed from is affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

FRANK G. WASGATT v. FIRST NATIONAL BANK OF BLUE EARTH.[1]

January 26, 1912.

Nos. 17,400—(209).

Bank check — assignment of funds — duty of bank.

A check on a bank in which the drawer has funds subject to check is an assignment of such funds of the drawer to the amount of the check, which

[1] Reported in 134 N. W. 224.

[Note] Bank check as an assignment of funds drawn upon, see note in 2 L.R.A.(N.S.) 83.

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assignment is complete as between the drawer and payee when the check is given, and complete as between the payee or holder and the bank when the check is presented for payment. Upon such presentation, the bank, unless its right to pay has been taken away by some occurrence before presentation, is legally bound to pay the check.

Action in the district court for Faribault county by the executor of the estate of Emeline Erskine, deceased, to recover a balance of $850 belonging to decedent on deposit in defendant bank at the time of her death. The answer alleged that on March 2, 1909, a check upon defendant for $850 duly made, executed and delivered by Emeline Erskine, payable to the order of Polly Perrine, was duly presented to defendant, in the regular course of business, and on that day defendant orally certified said check to be good and promised to pay it upon presentation when properly indorsed; that thereafter the check was presented to defendant for payment by the Farmers National Bank of Blue Earth, and defendant paid the Farmers National Bank the amount of the check, as it was required by law to do; that the first mentioned check was on March 2, 1909, executed and delivered to Polly Perrine by Emeline Erskine for a valuable consideration paid and rendered by said Polly Perrine; that Polly Perrine accepted the check as and for the sum of $850; that the Farmers National Bank bought and paid for the check from the last preceding indorser and that it was an innocent holder for value without notice of any defect or equity against it; that the check was duly returned to plaintiff with other vouchers in the account of Emeline Erskine on or about April 17, 1909. The reply was a general denial. The case was tried before Quinn, J., who made findings and as conclusion of law found that the delivery of the check by Emeline Erskine to Polly Perrine, the presentation thereof to the defendant bank for payment during the lifetime of the drawer and the statement on behalf of defendant bank that the check was good after indorsement operated as an assignment to the amount of the check of the money in the hands of defendant bank to the credit of Emeline Erskine; that under the proofs in the case plaintiff was not entitled to recover and that defendant was entitled to judgment. From an order deny-

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ing plaintiff's motion to amend the conclusions of law and order for judgment, or for a new trial, he appealed. Affirmed.

Albert R. Allen, for appellant.

Frank E. Putnam and *Catherwood & Nicholsen,* for respondent.

BUNN, J.

Plaintiff's testator, Emeline Erskine, died at the home of David E. and Polly Perrine, at Blue Earth City, on the evening of March 1, 1909. She had been living with the Perrines since November, 1908. From December 25, when she was taken ill, to her death, she paid no board, and was cared for by the Perrines. On February 27, she indorsed and delivered to David Perrine a certificate of deposit for $1,500, for the purpose of having the same cashed and the proceeds placed to her credit in the defendant bank, and on the same day the certificate was so cashed, and the proceeds, $1,498.50, deposited to her credit. On the same day Mrs. Erskine delivered to Polly Perrine a check upon the defendant bank for $850. On the following Monday morning, March 1, David Perrine presented the check to the defendant bank for payment, was told that it was good, but that it would have to be indorsed by Polly Perrine, the payee, before payment. The check was again presented to the bank, duly indorsed, on March 2, but payment was refused, because Mrs. Erskine was then dead. Subsequently the check was deposited in the Farmers National Bank of Blue Earth to the credit of Putnam & Nicholsen, presented to the defendant bank in the regular course of business, and paid. Plaintiff demanded of defendant bank payment of $850, and, the demand being refused, brought this action to recover that sum. The case was tried by the court without a jury, findings made substantially as stated above, and judgment ordered for defendant. A new trial was denied, and plaintiff appealed.

1. The record presents squarely the mooted question whether a check on a bank, given for only a part of the funds of the drawer on deposit, is an assignment pro tanto as between the drawer and the payee, and as between the payee and the bank when the check is presented for payment. This question is an open one in this state.

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Two propositions are, however, settled by our decisions. The first is that a bill of exchange or draft, payable generally, and not out of any particular fund or debt, will not amount, before acceptance, to an assignment to the holder of funds in the hands of the drawee belonging to the drawer, or of a debt due from the former to the latter. The second is that a draft for the whole of a particular specified fund or debt, or a check on a bank for the whole of the fund on deposit to the credit of the drawer, amounts in equity to an assignment of such fund or debt, even without acceptance. Lewis v. Traders Bank, 30 Minn. 134, 14 N. W. 587; Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L.R.A.(N.S.) 828, 117 Am. St. 694.

But upon the question whether a check drawn for part of the funds of the drawer is an assignment pro tanto, the authorities outside of this state are in hopeless conflict, and while the question was discussed at some length by this court in Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. 526, and in Varley v. Sims, we have never decided it. It was said by Justice Brown in the Varley case that "it is probable that the reasoning of those courts holding to the position that a check operates, between the parties, as an assignment pro tanto, is the better law, and should be adopted." This statement, while not a decision, indicates the views held by the court on the question, and the full and able arguments in this case convince us that the views so indicated are sound.

The question has been so often and so thoroughly discussed that an extended opinion is unnecessary. The rule that an order, bill of exchange, or draft drawn by a creditor on his debtor for a part of the debt is not an assignment pro tanto rests upon the basis that the debtor cannot be subjected to several actions by different parties to recover portions of one debt. The rule is wholly for the protection of the debtor. When he consents to the splitting up of the debt, the basis for the rule disappears, whether the consent is in the form of an acceptance when the order or draft is presented, or in any other form. The relation between a bank and its depositor is that of debtor and creditor. The bank agrees, when the relation is created, to pay the checks of the depositor when presented, whether drawn for

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the whole or a part of the deposit. It is the universal understanding between banks and their depositors arising from the customs of trade that the checks of the latter are to be paid upon presentation. 2 Daniel, Negotiable Instruments (4th Ed.) § 1638.

The objection that there is no privity between the bank and the payee or holder of the check is without substance under the modern rule that a person in whose favor a contract is made may sue upon it, though not a party to it, and such objection entirely disappears when the check is presented for payment. By that act the payee and the bank are brought in privity, and the right of the payee against the bank is complete. Without further discussion of the authorities, or of the reasons for and against the so-called "new doctrine," we hold that a check on a bank in which the drawer has funds on deposit subject to check is an assignment of such funds of the drawer to the amount of the check, which assignment is complete as between the drawer and payee when the check is given, and complete as between the payee or holder and the bank when the check is presented for payment. Upon such presentation the bank, unless its right to pay has been taken away by some occurrence before presentation, is legally bound to pay the check. When, therefore, the check was presented to the defendant bank in this case, it became legally obligated to pay it.

It is unnecessary, in view of this holding, to decide whether there was an acceptance of the check by defendant bank.

2. Plaintiff contends that the findings do not show that the check was given as a gift causa mortis, and in any event that a check by Mrs. Erskine on her own bank would be inoperative as a gift causa mortis. No question of a gift causa mortis or a gift inter vivos is involved. The evidence is not before us, and there is no claim that it does not sustain the findings. The findings show a check given for a valuable consideration. The check itself imported a consideration, and the burden was upon plaintiff to show want of consideration.

Our conclusion is that the trial court was right in holding that plaintiff was not entitled to recover.

Order affirmed.

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CITY OF INTERNATIONAL FALLS v. MINNESOTA, DAKOTA & WESTERN RAILWAY COMPANY.[1]

January 26, 1912.

Nos. 17,410—(188).

Railway — right to cross highways and streets.

The legislature has power to grant authority to a railroad company to cross public highways and streets, and authority to construct a railroad between designated points implies authority to cross highways and streets which the railroad intersects. The legislature may require that a franchise be obtained from a city or village before a railroad company is permitted to cross streets in such city or village; but, in the absence of such requirement, a franchise from the city or its consent is not necessary.

Same — section 2841, R. L. 1905—franchise from city.

R. L. 1905, § 2841, construed, and *held*, following Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate, 101 Minn. 132, not to require a franchise to be obtained from a city or village before a railroad company constructs its tracks across streets in such city or village.

Same — section 2916.

R. L. 1905, § 2916, construed, and *held* not to require such a franchise, or that there be an agreement between the city or village and the railway company as to the manner, terms, and conditions upon which a street may be crossed by the railroad.

Same — right to enjoin crossing before condemnation proceedings.

Conceding that under section 2916 a railroad company may and must acquire the right to cross a street in a city or village by condemnation proceedings, equity will not enjoin such crossing before such proceedings are begun; it appearing conclusively that the necessity exists, and that such city or village has at all times an absolute right to compel the railroad company to make the crossing safe for public use.

City has no proprietary right in streets — eminent domain — compensation.

A city or village has no proprietary rights in its streets. Whatever rights it has are held merely in trust for the public use. It is not entitled to compensation when a railway company crosses its streets, and the constitutional provision that private property shall not be taken for public use without just compensation first paid or secured does not apply.

[1]Reported in 134 N. W. 302.

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Action in the district court for Koochiching county to restrain defendant from operating its lines of railway across Fourth street, in plaintiff city, and from constructing any further lines and from in any manner interfering with or obstructing any of the streets or alleys of the city. From an order, Stanton, J., denying plaintiff's motion for a temporary injunction and vacating the temporary restraining order, plaintiff appealed. Affirmed.

Kane & Palmer and *Frank Palmer,* for appellant.

C. J. Rockwood, for respondent.

BUNN, J.

This is an appeal from an order of the district court for Koochiching county denying plaintiff's motion for an injunction pendente lite restraining defendant from building its tracks across any of the streets in the city of International Falls, and especially across Fourth street in said city. The facts, as they appear from the complaint and the affidavits considered on the hearing in the court below, are as follows:

Plaintiff is a municipal corporation under the laws of this state, and as such has the sole and exclusive control of all streets, highways, and alleys within the city. Fourth street is one of the duly indicated and laid-out highways and streets of the city, and furnishes the only outlet for travel between said city and the village of Rainier to the east thereof.

Defendant is a railroad corporation under the laws of this state, authorized to build, maintain, and operate as a common carrier, a line of railroad from a point of junction with the line of the Duluth, Rainy Lake & Winnipeg Railway in the county of Koochiching westerly to the city of International Falls, and to the international boundary in Rainy River; also a line of railroad from the city of International Falls southerly and westerly across the state to the west line thereof.

During the years 1909 and 1910 defendant constructed and has since operated its road into and through the city of International

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Falls. Its main line crosses Fourth street with three tracks. It proposes to construct and operate four more tracks across said street, sixteen feet apart. It has obtained no authority or permission from the city to lay these proposed tracks or its other tracks across said street. The affidavit of defendant's president, which was not contradicted, showed that it was necessary to the transaction of its business for defendant to construct and operate these tracks.

The question before us is whether defendant was obliged to obtain the consent of the city before constructing its tracks across the city streets.

1. The legislature had the power to grant authority to the railroad company to cross public highways and streets, and authority to construct a railroad between designated points implies authority to cross highways and streets which the road may intersect. A franchise from the city or village, or its consent, is not a prerequisite to the crossing of streets or highways in such city or village, unless the legislature has so provided. The legislature has the power, however, to provide that such a franchise or consent must be obtained, and in such case the railroad company is obliged to procure such a franchise from the city or village, or its consent, as a prerequisite to constructing its tracks across streets or highways within the limits of such city, or village.

These propositions are well settled by the authorities, among which we refer to the following: 33 Cyc. 194; 2 Lewis, Eminent Domain, § 430 (3d Ed.); Canton v. Canton, 84 Miss. 268, 36 South. 266, 65 L. R. A. 561, 105 Am. St. 428; Thompson v. Ocean City, 60 N. J. L. 74, 36 Atl. 1087; Raritan v. Port Reading, 49 N. J. Eq. 11, 23 Atl. 127; Northern v. Wilkes Barre, 218 Pa. St. 269, 67 Atl. 352; Morgan v. Des Moines, 113 Iowa, 561, 85 N. W. 902; Elliott, Railroads, § 1099; Chicago v. City, 220 Ill. 310, 77 N. E. 204; People v. North Tonawanda, 70 Misc. 91, 126 N. Y. Supp. 186. There is a well-recognized distinction between the right to cross a street and the right to occupy it longitudinally, and in stating the

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law as we have done we have reference solely to the crossing of streets and highways by railroad tracks.

2. The inquiry then is: Has the legislature provided that the consent of a city or village is necessary before its streets may be crossed by railroad tracks?

Section 2841, R. L. 1905, provides that no railway corporation "shall construct, maintain or operate a railway of any kind * * * in or upon any street, alley or public ground of a city or village, without first obtaining from, and compensating said city or village for a franchise conferring such right." It was decided in Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate, 101 Minn. 132, 112 N. W. 13, that to *cross* a street is not to construct a railroad *in or upon* such street, that the words "in or upon" refer to a longitudinal occupation, and that it was not necessary under this section to obtain from a city or village a franchise conferring the right to cross a street. This court said: "To hold that a franchise must be obtained as a prerequisite to crossing a highway, road, or street would put it in the power of the town, village, or city authorities throughout the state to practically block railroad extension. Such is not our view of the statute." We adhere to the decision in that case, and further consideration of section 2841, in this connection is unnecessary.

3. This brings us to the question whether R. L. § 2916, was intended to make the consent of a city or village a prerequisite to a railroad crossing its streets. This section is as follows:

"When in the location of any railroad, it becomes necessary to occupy any road, street, alley, or other public way, the municipal corporation or other public authority owning or having charge thereof and the railroad company may agree upon the manner, terms, and conditions in and upon which the same may be used or occupied, or such corporation may appropriate so much of the same as shall be necessary by condemnation proceedings under the right of eminent domain."

It is quite apparent that this section does not require a franchise from or the consent of a municipal corporation. It says that the

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municipal corporation and the railroad company *may agree* upon the manner, terms, and conditions in and upon which the street may be used or occupied, or that the railroad company may appropriate so much of the same as shall be necessary by condemnation proceedings, under the right of eminent domain. It is clear, then, that plaintiff has no right to insist that the company obtain and pay for a franchise, or that there be an agreement between plaintiff and the company as to the "manner, terms, and conditions in and upon which the" street "may be used or occupied."

The right of the city is confined to a right to insist that defendant proceed by condemnation proceedings to appropriate so much of the street as shall be necessary for its purposes.

Whether the city has even this right is a doubtful question. If to cross a street is not to "occupy it," and the section was intended only to cover cases where in the location of a railroad it becomes necessary to run *along* a street, then clearly condemnation proceedings are not required by this statute, in so far as concerns the interest of the municipality in its streets. But in the Manitou Forest Syndicate case it was said that, when it is the purpose of a railway company to merely cross a street, the right of way may be condemned under section 2916.

In Duluth Terminal Ry. Co. v. City of Duluth, 113 Minn. 459, 130 N. W. 18, it was held that the provision in R. L. 1905, § 2841, hereinbefore considered, enacted as chapter 74, p. 189, Laws 1893, took away the right given by R. L. 1905, § 2916, to a railway company to acquire by condemnation proceedings the public easement to construct, maintain, or operate a railway along a street in such city or village, and that a franchise from the city or village was a prerequisite. The decision was expressly limited to the construction of a railway *along* a street, and it was not decided whether section 2916 was still in force as to acquiring the right to cross a street in a city or village by condemnation proceedings. As it was decided in the Manitou Forest Syndicate case that it was not necessary to procure a franchise from the city or village, it would seem to follow that the provisions of section 2916 in regard to condemnation pro-

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ceedings are still in force, as applied to a crossing over a street in a city or village. We will assume for the purposes of this case that this is correct, and also that the words "to occupy" include a mere crossing, as well as a longitudinal occupation, and therefore that it is necessary for defendant to "appropriate so much of the" street in question "as is necessary by condemnation proceedings under the right of eminent domain."

4. This brings us to the question whether, at the suit of a city, equity will enjoin a railroad company from constructing its tracks across a street in such city, when such company has power to and must acquire the right to so construct its tracks by condemnation proceedings.

Is there not an adequate remedy at law? Is there any relief or advantage that would accrue to the city from an injunction that it could not obtain by an action to enforce its right after the acts sought to be enjoined are done? The city's rights in condemnation proceedings would be very limited. It could, perhaps, litigate the question of the necessity of the taking; but that it would be unsuccessful in any such defense is too clear to justify saying that this presents any substantial ground for an injunction. Defendant has done the grading for the four additional tracks, and had actually laid the ties and rails to the line of Fourth street on both sides thereof. The new and growing industries of the city require the tracks. It is inconceivable that a court would hold that they were not necessary, or that they could be constructed and used without crossing the street. Nor would condemnation proceedings give the city or the public any advantages in the way of an opportunity to insist that the crossings be made safe. The city has an absolute right to compel defendant to provide guards, gates, planking, bridges, and, in short, to do everything that goes to make a crossing safe for public use.

5. Any rights that the city has are clearly rights that would not be lost or affected by the actual appropriation of the easement before condemnation.

The city has no proprietary rights in its streets. Whatever rights

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it has it holds merely in trust for the public use. It is not entitled to compensation when a railway company acquires a right of way across its streets. Therefore, granting that the public easement in a street may be acquired by condemnation proceedings, the case does not fall within the constitutional provision that private property shall not be taken for public use without just compensation first paid or secured. Hence there is no basis for holding that equity will enjoin the taking until the compensation is paid or secured, both because the city is not entitled to compensation for the taking, and because the property is not private property. Abutting owners are not complaining. Presumably the company has acquired its right of way legally as to them.

All that the city is entitled to is that the tracks shall be so constructed and maintained as to make the crossing safe, and this right is amply secured by the common law as well as the statutes. It is impossible to hold that plaintiff has not an adequate remedy at law, and we conclude that the court below correctly denied a temporary injunction.

Order affirmed.

WILLIAM W. ARMS and Another v. CITY OF OWATONNA and Others.[1]

January 26, 1912.

Nos. 17,415—(176).

Mistakes in platted lots — reference to monuments.

Errors, mistakes, and ambiguities appearing in a recorded plat of lots and blocks, respecting the size and dimensions of the lots platted and the width of streets thereby laid out, may be corrected and explained by a reference to the monuments placed in the ground by the surveyor at the time of surveying and platting the land.

[1]Reported in 134 N. W. 298.

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Width of street — evidence.

A particular street in such a plat was designated as forty feet wide. It is *held* that the trial court was justified by the evidence in finding such designation an error or mistake, and that the street was in fact, as shown by the monuments placed in the ground by the surveyor, fifty feet wide.

Findings — evidence.

Findings of fact in other respects *held* supported by the evidence.

Action in the district court for Steele county to quiet title to a certain strip of land against a certain unlawful claim of defendant city; to obtain a decree that the city had no right to retain its sidewalk thereon; that defendant Watowa, as county treasurer, be ordered to accept from plaintiff $24.24 in full satisfaction of a certain tax levy; that defendant Bosshard, as county auditor, be restrained from certifying to the clerk of court for Steele county the tax as delinquent and from selling the land, and for judgment against defendant city for $75.

The complaint alleged a platting and subplatting of a certain lot in defendant city, and the conveyance to one of the plaintiffs of a portion of the same; that in 1909 defendant city notified plaintiff to construct a sidewalk on and along the north side of plaintiff's lot in the manner described in the complaint; alleged that, if laid as directed, the sidewalk would be wholly on plaintiff's lot and not in or upon any street, save at the easterly end thereof; that defendant city established and constructed a sidewalk in the manner directed; that plaintiff, before its construction, notified the city that he was ready to build a sidewalk at such place as it belonged, but that he had been forbidden from building the walk himself upon the proper location, and his failure to build the walk was in obedience to officials of defendant city; that the cost of the walk was attached by the county auditor to the tax assessed against the property for the year 1909; that plaintiff tendered to the county treasurer in lawful money the entire amount levied as taxes against the property, not including the assessment for this walk, and the tender was refused, and that unless restrained the county officials would sell said property.

The answer, among other matters, alleged that the notices to con-

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struct the walk were refused by plaintiffs on the sole claimed ground that the line given them by the city surveyor was not the true boundary line between the street and plaintiff's property, and that the line so given was the true line of the street and the plaintiff's property. The reply was a denial of new matter.

The case was tried before Childress, J., who made findings and as conclusions of law found that the action should be dismissed and defendants recover their costs. Plaintiffs' motion for a new trial was denied, but their motion to amend the findings and order for judgment was granted so far that the order granted judgment that defendant county treasurer accept the sum tendered in full satisfaction of the tax levy of 1909, and the county auditor be restrained from certifying the tax as delinquent, and for costs against defendant city.

From that part of the judgment, entered pursuant to the order for judgment, which adjudged and decided that the sidewalk constructed by defendant city was built and stood on the true line between sublot three of lot one of block two of Abbott's addition to said city and Flowerdale street in said addition, and reviewing on appeal the refusal of the court to find as requested in plaintiff's motion for amended findings, of date June 27, 1911, that plaintiffs were the owners of the premises and that the cement sidewalk was located for the most part upon plaintiffs' land and not on Flowerdale street, and the refusal of the court to find that the portion of Flowerdale street west of Pleasant street was of the width of forty and not of fifty feet, plaintiffs appealed. Affirmed.

J. A. & A. W. Sawyer, for appellants.

Sawyer & Sperry, for respondents.

BROWN, J.

This action involves the boundaries of plaintiffs' property, situated in Riverside addition to the city of Owatonna, and the issue is determined by an answer to the question whether the street fronting thereon, as disclosed by the recorded plat of the addition, is forty or fifty feet wide. The plat designates a street forty feet wide, but the trial court found that this was an error or mistake of the

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person preparing the plat, and that the street as laid upon the ground was in fact fifty feet wide. Judgment was ordered accordingly, and plaintiffs appealed.

Two questions are presented by the assignments of error: (1) Whether the designation on the plat of a street forty feet wide fronting plaintiffs' lot is conclusive, or whether it may be shown by the monuments and stakes set by the surveyor in platting the ground that by the original survey the street was fifty feet in width; and (2) whether the findings of the court are sustained by the evidence.

1. The plat of the addition of which plaintiffs' lot forms a part contains many irregular lots, as well as irregular streets and alleys. Plaintiffs own lot 1 of block 2. A stone monument was placed at the southwest corner of this lot at the time the land was surveyed and platted, and this was located by all the surveyors who were examined as witnesses on the trial below. From this monument the lot extends due north fifty-five feet, thence angles to the right a distance of eighty-eight and one-half feet, thence east one hundred forty-three and one-half feet, south one hundred thirty feet, and thence west one hundred ninety-five feet to the place of commencement. The plat designates the street fronting the lot on the angle mentioned as forty feet wide, and it is the contention of plaintiffs that the plat is conclusive, and cannot be overcome by parol evidence. In this we do not concur.

It is clear from the evidence that a mistake was made in the preparation of the plat, either in designating the boundaries, courses, and distances of plaintiffs' lot or in the figures indicating the width of this street. In this situation the authorities are clear that, in solving the error, reference may be had to the original monuments set in the ground at the time of the survey of the platted land. The monuments, when found and clearly identified, become conclusive. Turnbull v. Schroeder, 29 Minn. 49, 11 N. W. 147; 2 Notes to Minn. Cases, 270; 5 Cyc. 914, et seq., and the numerous authorities there cited.

The rule is in no way changed by the provisions of section 5, c. 29, G. S. 1878, the statute in force when this plat was filed, declaring

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that every grant or dedication to the public noted upon a plat shall be deemed in law and equity a conveyance of the same to the public. No question involving the effect of the plat is presented. A street was in fact dedicated to the public use by the plat, and the only question is the width of the same. Having found that the plat contained an error or mistake, either in the designation of the width of the street or in the dimensions of the plaintiff's lot, the monuments as located upon the ground were properly resorted to in determining the same.

The ambiguity or error in the plat also removes from the case the rule that a plat is not open to contradiction by parol evidence. The evidence in the case at bar was presented for the purpose, not of impeaching the plat, but to solve an apparent error or mistake, constituting an ambiguity, which is always open to explanation. Counsel's contention that the plat is conclusive of a street forty feet wide is not, therefore, sustained.

2. The further contention, that the findings of the trial court to the effect that the plat contained an ambiguity and that the street was in fact originally laid fifty feet wide are not sustained by the evidence, requires no extended discussion. Considerable evidence was offered by both parties, all of which we have carefully considered. From it the court was fully justified in so finding facts, and we discover no reason for interference with its conclusion.

That there was an error in the plat is quite clear. As already stated, a stone monument at the southwest corner of plaintiff's lot was made the basis of all the surveys of which testimony was given on the trial. By that monument as a guide, a survey of this lot in accordance with its dimensions as indicated by the plat gives to it the full quantity of land assigned by the plat, and leaves the street fifty feet wide. But by giving the street only forty feet, plaintiffs gain ten feet of ground. This of itself discloses an error in the markings on the plat.

In addition to this, the record presents evidence that the street was by the officers of the city and others treated as a street fifty feet wide, and it was improved as such for several years prior to

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the present controversy. And while in some respects the evidence is conflicting, we find from the record sufficient credible testimony to justify the court in reaching the conclusion it did, and without further discussion we sustain the findings.

Judgment affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

FRED RIECK v. RUDOLPH SCHAMANSKI.[1]

January 26, 1912.

Nos. 17,416—(175).

Injunction — draining surface water through a watershed — what is reasonable.

Action to enjoin the defendant from discharging surface waters from his own land, by means of a ditch cut through a natural watershed on his own land, upon the land of the plaintiff, thereby unreasonably and unnecessarily damaging the plaintiff. *Held:*

1. A landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another, but in so doing he must use all reasonable means to avoid unnecessary injury to the land of others.

2. What is reasonable in such cases depends on the special facts of each particular case. The fact that the artificial drainage is not along the natural course of drainage, but through a watershed, is an important, but not a controlling, factor under all circumstances in determining the question of reasonable use.

3. The findings of fact herein do not sustain the conclusion of law to the effect that the plaintiff is entitled to the relief prayed for.

Action in the district court for Steele county to recover $1,000 damages to plaintiff's land caused by the construction of a ditch upon defendant's land and the consequent overflow of surface water

[1]Reported in 134 N. W. 228.

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upon plaintiff's land. The case was tried before Buckham, J., who made findings of fact and as conclusion of law found that defendant was not entitled to relieve his land from the surface water naturally accumulating thereon by causing the same to flow upon and damage the land of plaintiff, or to turn the waters out of their natural course across the divide separating the land of the parties, even though the ditch was entirely upon his own land and the damage resulting to plaintiff less than the benefit which would accrue to himself; that plaintiff was entitled to have defendant enjoined from maintaining a certain tile drain opening onto plaintiff's land and for $50 damages. From an order, Childress, J., denying defendant's motion for a new trial, he appealed. Reversed and new trial granted.

J. A. & A. W. Sawyer, for appellant.

W. A. Sperry, for respondent.

START, C. J.

Appeal from an order of the district court of the county of Steele denying the defendant's motion for a new trial. The complaint alleged in substance that the plaintiff and defendant were adjoining landowners; that the defendant unnecessarily and unreasonably dug a ditch through and upon his own land, which changed the natural course of the surface water on his own land, and caused it to flow upon the land of the plaintiff, thereby causing unnecessary and unreasonable damages. Judgment was asked for the amount of the damages sustained and for a perpetual injunction restraining the defendant from so discharging such waters upon plaintiff's land.

The answer of the defendant admitted the construction of the ditch on his own land, denied that it was unnecessarily or unreasonably done, and alleged that there was no other available method of draining the surface water from his own land.

The cause was tried by the court without a jury, and findings of fact and conclusions of law made, which, as amended, are, briefly stated, these:

The plaintiff owns and occupies a farm of eighty acres of land

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adjoining on the west a farm of one hundred twenty acres owned and occupied by the defendant. Adjoining this last tract on the east, the plaintiff also owns a tract of eighty acres of land.

Commencing one hundred feet east of the line of defendant's farm, there is a ravine with high banks running in a general southwesterly direction through the north forty of plaintiff's farm, carrying the water that accumulates in a small watershed to the south forty thereof, where it spreads out into a small marsh of about six acres, thence across the highway on the west line of plaintiff's farm, and discharges on the land of one Olson into a so-called town ditch leading to the Le Sueur river. The fall from plaintiff's farm across the highway into the town ditch by way of Olson's land is very slight. The water flowing across plaintiff's farm through the ravine stands upon the slough on his south forty until the same either evaporates or slowly works its way across the highway into a ditch on Olson's land.

On defendant's farm there is a marsh of about twenty acres, which before the construction of the drain here in question was at all times covered with water, and had no natural outlet for the waters so accumulating thereon, except in times of high water, when the same flowed in a northeasterly direction and away from plaintiff's farm. This slough on defendant's farm was separated from the watershed on plaintiff's farm by a stretch of high, dry land, wholly on defendant's tract, one hundred fifty feet wide, which has at all times offered a natural and complete barrier and protection to the plaintiff's land from the waters accumulating in the slough on defendant's farm.

The defendant constructed a ten-inch tile drain through the high land separating his slough and the head of the watershed leading into and across plaintiff's land, one hundred fifty-two feet long and seven feet and ten inches deep at the highest point, and connected the drain with his slough by an open ditch, and thereby caused the waters of such slough to be discharged through the tile drain upon plaintiff's land, and to run down and cover his marsh and stand thereon, and thereby greatly injure plaintiff's pasture land, and

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render the same to a large extent incapable of use, and that by so doing he converted his own slough into ordinary pasture land.

The damages resulting to plaintiff's land up to the time of the commencement of this action amount to the sum of $50. The defendant threatens and intends to keep such drain open.

Prior to the construction of defendant's ditch, the water in his slough, when the same overflowed at times of heavy rains, found an outlet in a general northeasterly direction through a natural depression over and across the northwesterly corner of an eighty-acre tract, adjoining defendant's farm on the east, and owned by the plaintiff, and thence through a series of large, grassy sloughs, over the lands of one Hugh Murray and of other parties, to Cannon river. There was not, at any point between defendant's slough and Cannon river, any well-defined channel, with banks; hence to fully drain the water therefrom, and that accumulating along such natural depression, it would be necessary to construct a ditch beyond the land of Hugh Murray.

There is no evidence in the case from which the dimensions of such ditch could be in any manner determined. To drain defendant's slough in such northeasterly direction as far as the marsh on the lands of Hugh Murray, it would be necessary to open a ditch across a portion of plaintiff's east eighty, less than two feet deep at the highest point and not more than four hundred feet long. If such ditch were so constructed, it would be practicable to drain defendant's slough in the direction and through the channel which the overflow had always followed prior to the construction of defendant's ditch.

The court found as conclusions of law: "That the defendant was not entitled to relieve his own land from the surface water naturally accumulating thereon, by causing the same to flow upon and damage the land of the plaintiff, or to turn such waters out of their natural course across the divide separating plaintiff's land from defendant's, even though the ditch for doing the same was entirely

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upon his own land and the damage resulting to plaintiff less than the benefit which would accrue to himself."

Judgment was accordingly directed for the plaintiff, enjoining the defendant from maintaining the ditch, and for $50 damages.

Thereupon the defendant made a motion to have the findings of fact amended in several particulars relative to the question whether the defendant by his tile drain ditch unnecessarily and unreasonably caused the surface waters from his own farm to flow upon that of the plaintiff to his damage. The motion as to such requested findings was denied. Thereupon the defendant made a motion for a new trial.

The defendant's assignments of error are not sufficient to raise all of the questions discussed in the brief, but they are sufficient to raise the questions whether the trial court erred in finding that it would be practicable to drain the defendant's farm by a ditch northeasterly through the land of the plaintiff and that of Hugh Murray, whether the court erred in not finding that the construction by defendant of the tile drain ditch was a reasonable use and improvement of his farm, and that it does not and will not unreasonably affect the plaintiff's land, and also whether the facts found sustain the conclusions of law.

The principal question presented for our decision is the last one. The others are important only in connection with a consideration of the facts found. In analyzing the findings of fact, and in considering the question whether they justify the conclusions of law, it is essential to keep in mind the issue made by the pleadings, namely: Whether the defendant unnecessarily and unreasonably, by the tile drain ditch upon his own land, changed the natural course of the *surface water* on his own land, and thereby caused it to flow upon plaintiff's farm, causing him unnecessary and unreasonable damages. This was the issue tendered by the complaint, from which it appears that the waters in question are surface waters proper.

According to the findings of fact, there is no natural outlet to this surface water to the northeast over the plaintiff's land, except for

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that portion thereof due to heavy rains, which finds its way through a natural depression; but for the residue of such waters, after the *overflow* caused by heavy rains has ceased, there is no natural outlet in any direction for the surface waters resting on defendant's land. Such residue must remain on the defendant's land, rendering twenty acres thereof practically worthless, unless it can be drained in some direction by means of an artificial drain. The defendant constructed such a drain wholly on his own land, but through a natural watershed, and thereby turned the surface waters into the head of a ravine with high banks on his own land at a point one hundred feet from his west line, thereby reclaiming his twenty acres.

There is no finding that the defendant unnecessarily or unreasonably drained the surface waters into this ravine, or that he thereby unnecessarily and unreasonably damaged the plaintiff; the finding being that the damage to plaintiff was $50 from the time of the construction of the defendant's ditch to the commencement of this action, a period of more than two and one-half years.

Nor is there any finding whether it is feasible for the plaintiff to relieve his land from the surface waters coming down the ravine by opening a drain through his marsh. The evidence tended to show that it could readily be done, and at small expense.

There is no finding that it is practicable to drain the defendant's land by a ditch to the northeast. The finding in this respect is that, if the ditch were constructed, it would be practicable to drain defendant's land in that direction through the channel which the *overflow* had followed; but it is also found that between defendant's slough and Cannon river there are no well-defined banks, and to fully drain defendant's land it would be necessary to construct a ditch beyond the land of Mr. Murray. How far such ditch must be constructed, or the dimensions or cost thereof, or whether it is practicable for the defendant to secure such a ditch, does not appear from the record. The evidence, however, is practically conclusive that the defendant was refused permission to construct the suggested ditch over the land of the plaintiff.

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It is clear that it cannot be inferred as a matter of law from the facts found that the defendant unnecessarily and unreasonably constructed the ditch in question, or that he thereby unnecessarily and unreasonably damaged the defendant. It follows, then, that the conclusions of law are not justified by the findings of fact, unless the defendant had, as a matter of law, no right under any circumstances to drain his land by an artificial drain through a natural watershed on his own land, whereby the surface waters were carried upon the land of the plaintiff.

If such be the law, then the drainage in question was not a reasonable, but an unlawful, one, and the conclusions of law are supported by the findings of fact. It is quite evident, from the conclusions of law and the memorandum of the learned trial judge, that he was of the opinion that such was the law, and that he relied on the case of Erhard v. Wagner, 104 Minn. 258, 116 N. W. 577.

There are some statements in the opinion in that case which, construed without reference to its special facts, seemingly limit in all cases the right to drain surface waters by artificial drains to the line or course of natural drainage. If the opinion and decision in the Erhard case are to be construed as so declaring the law, then surface water which has no natural outlet, which is usually the case with surface water proper, cannot be drained under any circumstances. Such a construction of the Erhard case would be a repudiation of the rule of reasonable use laid down in the case of Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632, and a long line of cases approving the rule.

The controlling facts in the Erhard case, as shown by the findings in connection with the evidence, were that the defendant could secure thorough drainage of his own land along the course of natural drainage by a shallow ditch one mile long, one-fourth of which was on his own land, and that the plaintiff could only relieve his own land from the burden of the surface waters, cast upon it by the act of the defendant by cutting through a high watershed, by initiating a drainage system which would carry such waters to a natural waterway. Upon a consideration of such facts this court held, in effect, that the

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method adopted by the defendant for draining the surface waters from his own land was an unreasonable one, for he could not thereby compel the plaintiff to initiate a system of drainage upon and over his own land and that of others, when a similar course was open to the defendant by the deepening of a natural outlet.

It follows that the case relied upon does not modify the rule of reasonable use declared in Sheehan v. Flynn, supra, by requiring that the drainage of surface waters must under all circumstances follow the natural line or course of drainage.

The rule of reasonable use has been recognized, without modification, in several cases since the Erhard case, and the rule is now definitely settled that a landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another; but in doing so he must use all reasonable means to avoid unnecessary injury to the land of others—that is, he cannot, in draining his own land, cause unreasonable or unnecessary injury to the land below. What is reasonable in such cases depends upon the special facts of each particular case. The fact that the artificial drainage is not along the natural course of drainage, but through a watershed, is an important, but not a controlling, factor under all circumstances in determining the question of reasonable use. Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50; Howard v. Illinois Central R. Co. 114 Minn. 189, 130 N. W. 946.

It follows that the facts found by the trial court in this case do not sustain the conclusions of law, and that the order appealed from must be reversed, and a new trial granted.

So ordered.

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EDWARD C. COLE and Another v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

January 26, 1912.

Nos. 17,420—(185).

Shipment of live stock — presumption of negligence.

In an action against a common carrier to recover for injuries to horses while in transit, alleged generally to have been caused by rough and negligent handling by defendant, a presumption of negligence arises when plaintiff proves delivery to the carrier in good condition and receipt at destination in an injured condition.

Same — when accompanied by keeper.

The fact that the owner or his agent accompanies the horses relieves the carrier from special care and oversight of the animals, but does not change the presumption, unless it is shown that the injury was caused by the negligence of the owner or his agent. The verdict in this case *held* sustained by the evidence.

Agreement as to value.

Where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the values so agreed upon will be the limit of recovery. In this case it is held that the evidence does not show that the shipper and carrier agreed on the valuation of the horses.

Evidence — instructions.

There were no errors in the rulings on the admission of evidence, in the instructions to the jury, or in the refusal to give instructions requested.

Action in the district court for Hennepin county to recover $1,400, damages for injuries to five horses while in defendant's possession as carrier. The case was tried before Steele, J., and a jury which returned a verdict in favor of plaintiffs for $575. Defendant's motion for judgment notwithstanding the verdict or for a new trial

[1] Reported in 134 N. W. 296.

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was denied. One ground for the motion of defendant was misconduct on the part of the prevailing party on the trial of the action. The affidavits attached to the notice of motion asserted that in plaintiffs' Exhibit A, mentioned in the opinion, the figure on the exhibit had been changed from 3 to 5 during the course of the trial. From the order denying its motion, defendant appealed. Affirmed.

John L. Erdall, L. K. Eaton and *A. H. Bright,* for appellant.

S. Meyers, for respondents.

BUNN, J.

This action was brought to recover damages for injuries to five horses, claimed to have been caused by defendant's negligence while the horses were in its possession as carrier.

The complaint alleged that ten horses belonging to plaintiffs were delivered in good condition to defendant at Trout Lake, Wisconsin, to be transported to Minneapolis; that defendant handled the horses roughly and carelessly in transporting them; and that through its negligence five of the horses were bruised, maimed and injured, to plaintiff's damage in the sum of $1,400.

The answer admitted that plaintiffs delivered the horses to defendant for shipment, alleged that it transported them to Minneapolis without negligence, and that the transaction was under and pursuant to the regulations and tariffs of defendant, and a special contract relating to the liability of defendant, which contract was set out in the answer.

The case was tried and submitted to the jury, after defendant's motion for a directed verdict had been denied. The verdict was in plaintiffs' favor in the sum of $575. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from the order denying such motion.

1. It is contended that the verdict is not sustained by the evidence. Defendant's argument in this regard may be thus summarized: The complaint charged specific acts of negligence; therefore the burden was on plaintiffs to establish the negligence charged, and proof of the good condition of the horses when delivered to the

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carrier, and their delivery by the carrier in an injured condition, is not sufficient to make a prima facie case. In any event this presumption does not apply to live stock shipments, where the owner or his agent accompanies the stock to look after it.

The argument is unsound for several reasons. In the first place, the complaint does not allege specific acts of negligence, but alleges generally rough and negligent handling of the horses. Secondly, there was evidence tending, not only to show the injured condition of the horses when received at Minneapolis, but unusual and severe jolts and bumps during the journey, such as might cause such injuries. Nor does the fact that an agent of the owner accompanied the stock relieve the carrier from the exercise of care to avoid injuring the animals, or change the rule that a prima facie case of negligence is made when the owner shows the delivery of the property in good condition to the carrier, and that loss or damage has been suffered during its transit.

The carrier is relieved from special care and oversight of the animals when the owner or his agent accompanies them, but where an injury results without the fault of such owner or his agent, and from causes other than inevitable accident, the same presumption of negligence arises as in other cases. Boehl v. Chicago, M. & St. P. Ry. Co. 44 Minn. 191, 46 N. W. 333.

An examination of the record discloses abundant evidence of serious injuries to the horses while in transit, and there is no suggestion that these injuries were due to any want of care or attention on the part of plaintiff's agent. In addition there was evidence, as before stated, tending to show severe and unusual bumping and jolting of the cars in the train. The evidence made a case for the jury, and was sufficient to support the verdict.

2. Defendant contends that in the contract of shipment the parties agreed upon a valuation of $100 upon each horse, and that, as plaintiffs conceded that the five injured horses were worth $350 on their arrival at Minneapolis, plaintiffs were in no event entitled to a verdict for more than $150. Conceding that the instruction requested

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by defendant was sufficient to raise the question, we are of the opinion that defendant's contention is unsound.

It is the law of this state that, if the shipper and carrier agree as to the value of the property to be shipped, and the agreement is made fairly and honestly as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the valuations so agreed upon will be the limit of recovery. Alair v. Northern Pacific R. Co. 53 Minn. 160, 54 N. W. 1072, 19 L.R.A. 764, 39 Am. St. 588. But in the case at bar the parties did not stipulate or agree as to the value of the horses. The contract recites that:

"The rates provided in the tariffs of this company are based upon the following value of animals named, to wit:" $100 on each horse, $30 on each cow, etc. It then provides that when the declared value exceeds the above, or when the owner declines to declare the value, an addition to the rate will be made. Then follows this language:

"It is agreed between the owner and shipper of these animals and said railway company that the value [of these animals] does not exceed the amount set forth in this contract. And the shipment covered by this contract is accepted and forwarded subject to such agreed valuation, as follows:

Each horse or pony .....$——
Each cow ....$——"

The blanks left for the insertion of the valuation agreed upon were not filled in. For all that appears from the contract, the value of the horses shipped was never stipulated or agreed upon. The statement that the rates provided in the tariffs of the company are based upon stated valuations can in no way be construed as an agreement fixing the values of the horses shipped. It is not a statement that the rates charged the shipper were based upon such valuation. Such rates may have been based upon a greater valuation declared by the shipper, or upon his failure to declare the value of the stock.

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We hold, therefore, that the trial court correctly declined to instruct the jury on the subject of this contract.

3. Certain assignments of error challenge rulings of the trial court as to the admission of evidence. It was not error to refuse to strike out an offer of plaintiff's counsel to prove certain facts, the objection to which offer was sustained. Nor was it error to receive in evidence Exhibit A, which purported to be a receipt for the horses by the consignee, and had written across the front a statement by a freight inspector of defendant that he had inspected the horses in the consignee's barn and "found 5 horses with one swollen leg each, apparently had rough handling of train in transit." The objection made was that the evidence was "immaterial and irrelevant," and was insufficient to raise the point, which defendant here urges, that it was hearsay.

The claim of "misconduct of counsel" relating to this statement was a matter for the trial court to determine, and we find no ground for a new trial here.

It was within the discretion of the trial court to permit certain witnesses to testify for plaintiff in rebuttal, and we find no abuse of discretion in this respect.

4. There was no error in the charge, or in the court's refusal to give instructions requested by defendant. The more important of the questions raised by the assignments of error in the instructions given and refused have been already disposed of in this opinion. The others involve either verbal inaccuracies, or requests covered by the charge. On the whole, the instructions given clearly and correctly submitted the issues to the jury.

Order affirmed.

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JAMES McCOY v. MINNEAPOLIS, ST. PAUL, ROCHESTER & DUBUQUE ELECTRIC TRACTION COMPANY.[1]

January 26, 1912.

Nos. 17,450—(228).

Illegal obstruction of highway by defendant's work — substituted way — duty of defendant.

Defendant, to facilitate public travel upon a highway over and across which it was constructing its railroad grade, in which work it completely obstructed the highway, voluntarily acquired from an adjoining landowner the right of passage over his land, and impliedly, if not expressly, invited the public to make use of the substituted way. It is *held* that defendant was under legal obligation to keep and maintain the way so provided in reasonably safe condition for public use.

Verdict sustained by evidence.

Evidence considered, and *held* to support the verdict.

Action in the district court for Dakota county to recover $1,598 for personal injuries. The answer denied that at the time alleged it was actually engaged in the construction of certain embankments, excavations and fillings, and alleged that on or about that date H. F. Balch & Company was engaged as an independent contractor in such construction at certain places in Scott and Dakota counties; that if plaintiff received injuries at the time and place mentioned, they were caused by his reckless driving of a certain team of horses. The reply was a general denial. The case was tried before Johnson, J., and a jury which returned a verdict in favor of plaintiff for $640. From an order denying defendant's alternative motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Boutelle & Chase and *R. T. Boardman,* for appellant.

Albert Schaller, for respondent.

[1]Reported in 134 N. W. 293.

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BROWN, J.

Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts, briefly stated, are as follows: Defendant was engaged in constructing its roadbed as it extended over and across a public highway. The railroad right of way crossed the highway at right angles, and the excavations thereon completely obstructed the highway during the work of construction. The cut through the highway was fifty feet wide and about ten feet deep. To avoid interrupting travel upon the highway, defendant's chief engineer acquired from an adjoining landowner the right of passage for teams over his property for a short distance north and parallel with the railroad, thence across the right of way, and back to the highway; and people traveling upon the highway made use of this passageway around the obstructions. There was no other highway within several miles which the public could have used pending defendant's work, and those having occasion to travel upon this one were of necessity compelled to pass over the temporary way provided for them by defendant.

On the day in question plaintiff and his son approached the railroad grade upon the highway, and upon reaching the right of way drove their team upon the way so provided by defendant, and when within about seventy feet from the place where defendant's excavations were going on a steam shovel, operated by an independent contractor in grading the railroad, was started in motion, and a sudden and violent exhaust of steam and noise from the machinery frightened the horses, causing them to plunge forward, throwing the wheels of the wagon into a rut in the improvised roadway, upsetting the wagon, and throwing plaintiff to the ground, causing the injuries here complained of.

Plaintiff brought this action for damages, charging in his complaint that defendant was negligent in not providing a reasonably safe way around the obstructions created by it in the highway, and in causing the horses to become frightened by carelessness in the

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operation of the steam shovel. The court instructed the jury that no recovery could be had for negligence in the operation of the steam shovel, because of the fact that it was being operated by and was under the control of an independent contractor, but further charged that if the failure of defendant to provide a reasonably safe passage around the excavations concurred with the sudden noise from the steam shovel, and the combination of both was the proximate cause of the accident, then plaintiff could recover. Plaintiff had a verdict for $640.

The assignments of error present the questions (1) whether the evidence supports the verdict; and (2) whether the court erred in its instructions to the jury.

1. We have examined the record with care, and reach the conclusion that the evidence sufficiently supports the verdict in all essential respects. That plaintiff's team became frightened by the sudden and violent noise from the steam shovel, causing the horses to plunge forward, drawing the wheels of the wagon into the rut in the traveled way, and that this combination was the proximate cause of plaintiff's injuries, is clear from the evidence. The only serious question in the case is whether defendant is chargeable with negligence in respect to the condition of the passageway leading around the obstructions in the highway. We come directly to that question.

2. The question of the rights, duties, and obligations of a railroad company in situations like that here presented—when in the construction of its road over and across a public highway it wholly obstructs travel thereon pending the completion of its work—is not, for reasons hereafter to be stated, necessarily involved, and we do not consider it.

Counsel for defendant earnestly contended on the oral argument that, since the company possessed no power to lay out public highways, it could not be required to provide a passageway over private property for the accommodation of the traveling public, and, further, since the public authorities had not required that defendant provide a substituted way, that no duty rested upon it to do so, and hence

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that no liability exists because of the unsafe condition of the substituted way in fact provided by defendant. There can be no serious question that in situations like that here presented the company owes some duty to the traveling public. Just what the duty is we need not, for the following reasons, determine at this time.

It was conceded by defendant, both on the oral argument and in its brief, that the obstruction of the highway was illegal, and might have been enjoined by proper proceedings for the purpose, and, further, that it was within the power and authority of the public officials having jurisdiction of the highway to have required of defendant, as a condition to the right to obstruct the highway during the completion of its work, the construction of a temporary way around the same, and, if such a requirement had been made, that defendant would have been liable for any injury occurring in consequence of its failure of compliance therewith. But counsel insisted that since no such order was ever made, and defendant possessed no authority to lay out a public highway, it is not liable. We are unable to concur in this contention.

At the time defendant entered upon the highway, or soon thereafter, it recognized an obligation on its part to provide a passage around the obstruction created by it, and voluntarily undertook to provide the same. It anticipated action by the public authorities, and acquired of an adjoining landowner the right of passage over his farm. Having assumed the obligation without specific orders or directions from the public authorities, the duty of exercising reasonable care to provide a safe way applied to the same extent as though its action had been in compliance with and pursuant to public command. Its duty in the premises would be the same in either case.

What the situation would have been, had it appeared that defendant had been duly commanded by public authorities and was unable to secure the right from the landowner, is therefore of no consequence. Defendant voluntarily performed in its own way a duty which it recognized, and which it could have been required to perform in some manner, though perhaps not in this particular manner. That defendant acquired this right of passage for the benefit of the

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public is clear from the evidence, and that the public was thereby, impliedly at least, if not expressly, invited to make use of it, is also clear. At folio 153 the chief engineer of defendant expressly stated that he acquired the right for the public use; and having so acquired it, and so invited the public to use the same as a substitute for the regular highway, defendant was under legal obligation to keep and maintain it in reasonably safe condition for travel.

3. We discover no error in the instructions of the court of a nature to justify a new trial. While the court stated to the jury that defendant was under legal obligation and duty to provide the substituted way, the case in fact went to the jury upon the question whether defendant was negligent in the maintenance of the way voluntarily acquired by it. The instructions, taken as a whole, presented the case properly to the jury.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

STATE ex rel. GEORGE T. SIMPSON v. COUNTY OF ST. LOUIS.[1]

January 26, 1912.

Nos. 17,454—(232).

Act constitutional.

Chapter 248 of Laws of 1895 is not in contravention of section 33, art. 4, of the Constitution.

Boundary of county.

Held, that acquiescence by the state and the counties of St. Louis and Lake in the boundary line between said counties, as located and fixed by said act, for fifteen years, precludes inquiry into the correctness of such location.

[1]Reported 134 N. W. 299.

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On information of the attorney general, in behalf of the state, this court issued its writ of quo warranto directing the county of St. Louis to appear and show by what warrant it assumed to exercise jurisdiction over the territory lying east of the boundary between the counties of St. Louis and Lake, as fixed by the act of 1895 (c. 248). The respondent's answer, among other matters, alleged that the mouth of Knife river, where it empties into Lake Superior, at the time of the creation of St. Louis county, was, and at the present time is, located at a point approximately one mile easterly from the dividing line between ranges 11 and 12 west, and that the act in question was unconstitutional and void, being in conflict with Const. art. 4, § 33, as amended in 1892. The reply denied that the mouth of the Knife river was as alleged and averred it was approximately three quarters of a mile east of the dividing line between the ranges mentioned. Ordered that a writ of ouster issue.

George T. Simpson, Attorney General, and *B. F. Fowler,* County Attorney, for relator.

Charles E. Adams, for respondent.

HOLT, J.

Upon the information filed in this court by the attorney general of the state in its behalf, a writ was issued directing the respondent, the county of St. Louis, to show by what warrant it exercised jurisdiction and control of a part of the territory belonging to Lake county. The respondent has answered, and the relator replied. Upon the admission contained in the pleadings, each party claims a decision in its favor.

The admitted facts are these: The counties of Lake and St. Louis have for more than fifty years last past been political corporate subdivisions of the state, being established under and by virtue of the provisions of chapter 35 of the General Laws of the Territory of Minnesota for 1856 [p. 63], wherein the westerly boundary line of Lake county is described thus: "That so much of Minnesota territory as lies east of a line commencing at the mouth of Knife river on the north shore of Lake Superior, and running due north to the

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boundary line between the United States and the British possessions, shall be and is hereby erected into a separate county, which shall be known by the name of Lake." The east boundary of St. Louis county is in the same act made coincident with the west boundary line of Lake county. From the time of the organization and up to 1895, St. Louis county assumed jurisdiction of a strip of territory lying between the line dividing range 12 west and range 11 west and a line drawn parallel and one mile to the east thereof. The respondent asserts that the mouth of the Knife river is approximately one mile east of the line dividing said ranges 11 and 12, while the relator claims the distance to be no more than three-fourths of a mile. The legislature, by chapter 248 of the General Laws of 1895, [p. 622] entitled "An act to define the boundary between the counties of St. Louis and Lake," defined the boundary line between these counties to be coincident with the line known as the true meridian; the same being the line dividing range 11 west from range 12 west.

Respondent admits that at all times subsequent to the passage of this act, and up to December, 1910, the county of Lake has actually had complete control of and exercised jurisdiction in every way over all the territory lying east of the easterly boundary line of said range 12, and that the exercise of such jurisdiction and control of said territory, and the whole thereof, by said Lake county, ever since the month of April, 1895, has been recognized and acquiesced in by the state of Minnesota. It further admits that the exercise of such jurisdiction and control over the said territory by said Lake county, and the right so to do, has been recognized and acquiesced in by the county of St. Louis, and the said line between the said ranges 11 and 12 has been recognized and acquiesced in by the last-named county as the true boundary line between said counties ever since 1895, and until December, 1910.

The respondent further admits that since the last-named date it has been and is now claiming that said range line between ranges 11 and 12 is not the true boundary line between it and Lake county, and asserts that since December, 1910, it has been exercising jurisdiction and control over a strip of land about one mile in width off of and

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along the west side of said range 11 west, extending from the south boundary line of township 62 north to the north boundary line of township 64 north, containing in the aggregate eleven thousand acres of land, and that it will continue to attempt to exercise such jurisdiction over the same; that being the same territory described in the information as part of the territory of Lake county.

In this proceeding the respondent contends that the act of the territorial legislature of 1856 fixed the boundary line between the counties of St. Louis and Lake as the line due north from the mouth of Knife river, and that after the adoption of the constitutional amendment the legislature had no power by special act to change the boundary line of counties. Hence chapter 248 of the Laws of 1895, which, it is claimed, attempted to change the boundary between these counties, comes within the constitutional inhibition, and is of no effect. Respondent also asserts that the only other ground on which the right of Lake county to the territory in question could be based is untenable, namely, that the exercise of de facto jurisdiction for fifteen years, with the knowledge and acquiescence of the state and St. Louis county, will preclude the rights of Lake county to the territory from being questioned.

The principle is too well established to need citation of authorities that courts must assume that legislative enactments are valid until it appears beyond a reasonable doubt that they unavoidably contravene some provision of the Constitution. Section 33 of article 4 of the Constitution forbids the legislature to change county lines by special act. Does chapter 248 of the Laws of 1895 change, or purport to change, this county line? The act does not purport so to do, and it does not seem necessary to hold that such is in fact the effect thereof. It reads:

"An act to define the boundary between the counties of St. Louis and Lake.

"Whereas, it is represented to the legislature that the boundary between the counties of St. Louis and Lake has no permanent loca-

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tion and that great inconvenience has resulted and is likely to result because of the indefiniteness thereof; therefore

"Be it enacted by the Legislature of the state of Minnesota:

"Section 1. That the boundary line between the counties of St. Louis and Lake be and is hereby defined to be coincident with the line known as the true meridian; the same being the line dividing range eleven (11) west from range twelve (12) west; and that this definition thereof shall be taken and accepted in all courts and places whatsoever as the true intent and meaning of that part of the act of the legislature of the territory of Minnesota which ordains that the said boundary line shall begin at the mouth of Knife river and extend due north therefrom."

When the territorial act was passed creating and defining the boundary of Lake county, little care was taken to fix the boundary line between it and St. Louis county. The mouth of Knife river was made the starting point, and the division line ran due north. Where the mouth of a river may be several hundred feet wide, and the channel or center thereof may vary, the starting point is somewhat uncertain. From admissions made at the argument it is clear that it does not coincide with the boundaries of any government description of land, and also that St. Louis county had in fact assumed to exercise jurisdiction beyond and east of the starting point; that is, for one mile east of the range line, although three-fourths of a mile east more nearly coincides with the center of the mouth of Knife river. The course due north, given in the act of 1856, construed in accordance with the decisions at that time, would mean due north according to the magnetic meridian instead of the true meridian. See note to Wells v. Jackson (47 N. H. 235) in 90 Am. Dec. 575.

It is also apparent how necessary it was for the security of land titles to know in what county conveyances affecting lands contiguous to this boundary line should be recorded. In this situation in 1895, when the country near this line began to develop and property rights of both private individuals and public bodies corporate became more valuable, it certainly became important that any vagueness or am-

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biguity in the county boundary line should be settled. No general law for this purpose existed at that time; and it would seem not necessary to hold that, by making the boundary line, which had been left floating and uncertain, fixed and definite, thereby such boundary line was changed. There was a boundary line between the counties of Lake and St. Louis, but its exact location was uncertain. To fix and locate this line is not equivalent to changing it from one definite location to another. It is therefore not necessary to hold chapter 248, p. 622, Laws of 1895, void, because prohibited by section 33, art. 4, of the Constitution.

But, even were it conceded that the act of 1895 referred to comes under the constitutional prohibition, the undisputed facts show that the true boundary line must now be taken to be the line dividing range 11 from range 12. It cannot be questioned that the legislative department of the state, by chapter 248 of the Laws of 1895, recognized this line as the true boundary. Notice of this recognition was given to the officials and citizens of the state through the publication of the law. The executive department of the state had recognized the territory now in dispute ever since as a part of Lake county in the taxes collected and dealings had with the counties involved and with the towns and school districts in the affected territory; and no doubt some part of the judiciary branch of the state government has also had occasion during these fifteen years to recognize the dividing range line as the county boundary line.

We must take judicial notice of the conduct of affairs in an organized county. Township organizations exist, road districts are formed, school districts are established, all according to definite fixed lines within the county. It is indispensable that there be absolute certainty in regard to the location of any property in a governmental division or subdivision, so that it may be subject to its proper taxes, and that the residents in a territory may definitely know where their privileges may be exercised and their burdens discharged. We may also take notice of the fact that since 1895 there has been a marked and rapid development in portions of both of these counties, and in at least parts of this disputed territory. During fifteen years

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road and school districts and township organizations have been adjusted and have been operated on the basis that the range line mentioned is the division line between the counties.

We may assume that the county, the towns, and school districts involved have, by the erection of public buildings and schools and the construction of roads and bridges, incurred liabilities to meet which taxes have been collected, and were intended hereafter to be collected, on the supposition that the territory now sought to be detached by St. Louis county was part of Lake county. Add to this the interest of private individuals holding conveyances to lands located east of this range line, and who have had these recorded in Lake county. The confusion and injustice that would arise if, after fifteen years of undisturbed conduct and development of the affairs in the county, a change in the territorial limits were now made, forbids the consideration of the claim that the range line mentioned is not the true boundary line.

The respondent admits that Lake county has, since the passage of the act of 1895, actually had complete control of and exercised jurisdiction in every way over the whole territory embraced between the line dividing said ranges 11 and 12 and a line drawn parallel thereto and one mile east thereof, except that portion lying between the south boundary of township 62 and north boundary of township 64, which in December, 1910, St. Louis county undertook to take jurisdiction over, and, further, that the state of Minnesota has, during all that time, recognized and acquiesced in the right of Lake county so to do as to the whole of said strip of one mile in width, and also that respondent so recognized and acquiesced in the action of Lake county, with the exception noted as to eleven thousand acres thereof in townships 62, 63, and 64 since December, 1910.

We hold that such recognition and acquiescence should now estop both the state and St. Louis county from claiming that any territory east of the range line between the two ranges mentioned is within the jurisdiction of St. Louis county. State v. Village of Harris, 102 Minn. 340, 113 N. W. 887, 13 L.R.A.(N.S.) 533, State v. School District, 85 Minn. 230, 88 N. W. 751, State v. Olson, 107

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Minn. 136, 119 N. W. 799, 21 L.R.A.(N.S.) 685, and People v. Alturas, 6 Idaho, 418, 55 Pac. 1067, 44 L.R.A. 122, announce this principle of estoppel which we consider applicable to the facts in this proceeding. See also Edwards County v. White County, 85 Ill. 390, where this pertinent language is used:

"If the language of the statute were more ambiguous than we conceive it to be, it would still be competent, in solving the doubt, to consider the acts of the public authorities in recognition of the boundary line; and, upon principles of public policy, where, as here, courts, assessors, and collectors of taxes, and other officers having duties, limited to the respective counties, to perform, have for a long time recognized and acted upon the assumption that a given line is the true boundary line between the counties, we shall not inquire whether, in the first instance, the line was the one intended or not. The quiet and good order of communities ought not to be disturbed by controversy in regard to such questions, after at least the expiration of the period fixed for the limitation of actions between individuals where title to real estate is controverted; and this, not because in such a controversy counties are necessarily within the contemplation of the statute of limitations, but because the public welfare forbids that the possibility of strife and controversy in regard to boundary lines between counties should continue indefinitely. The principle is recognized in" Hamilton v. McNiel, 13 Grattan, 389, and Hecker v. Sterling, 36 Pa. St. 423.

Our conclusion is that a writ of ouster must issue against the respondent. So ordered.

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W. E. VAN PELT v. S. G. BERTILRUD and Others.[1]

January 26, 1912.

Nos. 17,486—(241).

Drainage bonds — direct obligation of county.

The bonds issued by the county under the drainage act (section 18, c. 230, of the Laws of 1905, as amended) are the direct and general obligations of the county issuing the same.

Act valid.

The provision of the act, so construed, is within the legislative power.

Action in the district court for Roseau county to permanently enjoin the auditor of that county and the members of the county board from proceeding further in the matter of a certain bond issue and from signing, executing or delivering the bonds of the county. From an order, Grindeland, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

Gideon S. Ives, for appellant.

M. J. Hegland, Ambrose Tighe, and *William J. Brown,* for respondent.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks,* Assistant Attorney General, filed a brief in behalf of the state.

J. M. Martin and *H. C. Deering,* as friends of the court, also filed a brief.

HOLT, J.

Plaintiff brought this action to restrain the auditor and board of county commissioners of Roseau county from issuing and negotiating bonds under the provisions of section 18, c. 230, p. 322, Laws 1905 [R. L. Supp. 1909, § 2651—61], in such form as to create a direct obligation of the county. A demurrer to the complaint being sustained, plaintiff appeals.

[1]Reported in 134 N. W. 226.

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From the complaint it appears that pursuant to the provisions of the drainage statute a ditch was duly established in the county, the contract for its construction duly let, and a large part thereof completed by the contractor; that on October 12, 1911, it became necessary to provide funds for the payment of the expenses incurred and to be incurred in the construction of the ditch, and thereupon the county commissioners duly passed a resolution that negotiable bonds of the county of Roseau be issued for $13,000 to defray in part said expenses. The form of the bonds is set out in full, and shows on its face compliance with section 18, c. 230, p. 322, Laws 1905, as to the time of payment and interest. It stated that it is issued by authority of and in strict accordance with the provisions of the drainage act, and also contained this recital:

"That the ditch on account of which this bond is issued is a public drainage ditch duly and legally established for the health, convenience and general welfare of the public, and that the total indebtedness of said county, including this bond, does not exceed any statutory or constitutional limit. The full faith, credit and resources of the county of Roseau are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond at maturity."

It is alleged that the bonds were properly signed and a sale negotiated, so that unless restrained, the county would complete the sale, receive the money therefor, and place the same in the county ditch fund. By proper averments plaintiff shows that he is a landowner in the county, but that his lands are not benefited by the ditch, and are not assessed for alleged benefits under the act; that there will not be sufficient funds collected from the benefits assessed to pay for the expenses of the ditch, and hence plaintiff's land will be burdened in the general taxes to pay for the same.

The appeal presents these two questions: (1) Did the legislature intend that the bonds issued under the drainage act should be the direct obligations of the county? (2) If such be the intent and meaning of the law, had the legislature the power so to provide?

1. The theory upon which drainage legislation rests is public utility and welfare. The interests of individuals are incidental,

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and can never alone justify either changing or affecting property against the owner's consent, as may be done in establishing drains. It is to subserve a public purpose, and not private ends, that the law was enacted. With this in mind, it is not difficult to come to the conclusion that the legislature intended that the county should be primarily and directly liable for the expense of establishing, constructing, and maintaining this public utility. And if the expense is paid by the county by the issue and sale of bonds, then the county should pledge its credit for the payment of such bonds.

This intention is also disclosed in the provisions and general tenor of the law. Section 11 [Laws 1905, p. 316] provides that, where damages have been awarded to any person, the county commissioners shall order the same paid out of the treasury of such county. The contracts for the construction shall be in the name of the county, and the bonds required from the contractors shall run to the county. Section 14 [p. 318]. For keeping the ditch in repair the general revenue fund of the county shall be drawn on. Section 26 [p. 327]. Then in section 18 [p. 322], as amended by subsequent acts (section 3, c. 367, p. 514, Laws 1907, and section 7, c. 469, p. 573, Laws 1909, [R. L. Supp. 1909, 2651—61]) it is provided the county boards may issue "the bonds of their respective counties" in such amount as may be necessary "to defray, in whole or in part, the expense" of the ditch; the board shall have power to negotiate the bonds as they shall deem for "the best interest of said county;" the proceeds from the sale of such bonds shall be placed in "a general ditch fund;" and the county board "shall provide moneys for the payment of the principal and interest" of the bonds, "which moneys shall be placed in the general ditch fund, into which fund it may transfer any surplus moneys." Nowhere is there any provision whereby any one but the county may receive or enforce collection of the assessments or liens placed against benefited lands.

Looking at the law from a practical business standpoint, the conclusion seems plain that the law intends that the faith and credit of the county should be pledged in the issue of drainage bonds. To bring the best price and a ready sale, bonds must be issued by an

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obligor whose responsibility is readily ascertainable and undoubted. The financial standing and responsibility of a county is not difficult to ascertain, and it is security of high order as compared with a security given only by the assessments and liens on the lands benefited.

Prospective purchasers of bonds might well be turned away, if the law is that the only security is the assessments against benefited property, for the value of the lands upon which these are placed must be examined. This may involve great inconvenience and expense. It is highly improbable that the legislature intended to jeopardize and hamper drainage work, now deemed of such public importance, by not providing the best of securities available from which to raise the requisite funds. We hold that in the purpose, in the import of the language in its provisions, and in the practical view of the drainage act of 1905 and its amendments, the legislative intent is manifest that bonds issued thereunder are the direct obligation of the county.

The only basis for a contrary holding is the provision in the law that most, if not all, the funds expended for the improvement are to be refunded to the county by assessments against the property specially benefited. This is the view taken by the courts in Indiana. See decisions cited and necessarily adopted in Braun v. Board of Commissioners of Benton County (C. C.) 66 Fed. 476. However, the weight of authority is that such provision in the law does not narrow the security of the bonds to that given on the lands assessed for benefits, but that the governmental body upon which the duty is cast to issue the bonds thereby pledges its full faith and credit for their payment directly and generally, and not in any restricted sense. State v. Commissioners, 37 Oh. St. 526; Millard v. Adams, 136 App. Div. 669, 121 N. Y. Supp. 504; State v. Shawnee, 83 Kan. 199, 110 Pac. 92; Fowler v. City, 85 Wis. 411, 54 N. W. 800.

2. Little need be said on the second question. This court has already held drainage acts constitutional on the ground that projects thereby contemplated are for the public health and welfare. Lien v. Board of County Commissioners, 80 Minn. 58, 82 N. W. 1094,

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holding valid chapter 97, p. 148, Laws 1887, an act of similar purpose to the act under consideration. State v. Board of County Commissioners, 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161, upheld the drainage act (chapter 258, Laws 1901), of the same import, as constitutional. The construction of drainage ditches being the exercise of a governmental function, delegated to the counties of the state for the promotion of public health, welfare, and utility, there ought to be no doubt that all the property within the county may be subject to taxation to provide the funds therefor. That most, or part, of this burden is laid on property specially benefited, is no reason why the owners of other property thus relieved should have any warrant for claiming that the law violates any of their constitutional rights. In other words, the legislature may provide different taxing districts within a county, and is not bound by governmental subdivisions therein. Maltby v. Tautges, 50 Minn. 248, 52 N. W. 858.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

FANNIE D. GRANT v. JOHN E. KING.[1]

February 2, 1912.

Nos. 17,254—(76).

Parol evidence to vary writing.

The test of the completeness of a written contract is the writing itself, and parol evidence to show that it is incomplete is not competent.

Same — contract implied by law.

The terms and conditions of a written contract implied by law are no more subject to variation by parol evidence than its express terms

Construction of contract.

A writing, referred to in the opinion, relating to the pledge of two dia-

[1]Reported in 134 N. W. 291.

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mond rings to secure plaintiff's note to defendant, construed, and *held* to be a complete contract on its face, and that parol evidence was not competent to show that the rings were also pledged to secure the debt of a third party.

Action in the municipal court of St. Paul to recover possession of certain rings or $445, the value thereof, and for $20.40 for the detention of the rings. The case was tried before Hanft, J., who made findings and as conclusions of law found that plaintiff was entitled to the rings or $445, their value. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

F. M. Catlin, for appellant.

Essie W. Williams, for respondent.

START, C. J.

This action was brought in the municipal court of the city of St. Paul to recover from the defendant the possession of two diamond rings, or their value, $445, in case a recovery of the possession thereof could not be had.

The complaint alleged that the plaintiff was the owner of the rings, and their value; that she delivered them to the defendant to secure the payment of a loan of $105, for which she executed to the defendant her promissory note; that at the maturity of the note she duly tendered to the defendant the amount due on the note and demanded the return of the rings; that the defendant refused to deliver them, and she deposited the amount due on the note with the clerk of the court, subject to the order of the court.

The answer was to the effect that the rings were delivered to the defendant pursuant to the agreement of the parties that, in consideration of a loan by the defendant to the plaintiff in the sum of $105, with which to redeem the rings which were then pledged to a pawnbroker, they should be delivered to him to secure the payment, not only of her note, but also the sum of $120, then due from her husband to the defendant, and that this debt had not been paid.

The reply denied the alleged agreement that the rings were pledged to secure the husband's debt.

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The cause was tried by the court without a jury, and facts were found substantially as alleged in the complaint. As a conclusion of law judgment was directed for the plaintiff, and that the amount of the tender be paid to the defendant upon his demand. The defendant appealed from an order denying his motion for a new trial.

The assignments of error raise the sole question whether the trial court erred in excluding parol evidence tending to show the alleged agreement that the rings were delivered to the defendant to secure the payment of the husband's debt, in consideration of the loan made to the plaintiff.

It appears from the record without substantial controversy that, at the time of and as a part of the transaction whereby the defendant loaned to the plaintiff $105 and she delivered the rings to him, he personally prepared two written instruments, which were signed and delivered by the respective parties as follows:

"St. Paul, Minn., Jan. 5th, 1909.

"$105.00.

"On or before six mos. after date, I promise to pay to the order of John E. King, one hundred five dollars, at 519 Pioneer Press Bldg., St. Paul.

"Value received, with interest at 6 per cent per annum.

"Mrs. B. L. Grant."

"Jan. 5, 1909.

"Rec'd from Mrs. B. L. Grant a promissory note for value rec'd for one hundred and five (105) dollars, payable on or before six months from date hereof, and secured by two rings left in my possession. It is understood I am not responsible for same in case of loss by robbery or fire.

"John E. King."

Thereupon the note and the pawnbroker's receipt for the rings were delivered to the defendant, and his receipt for the rings to the plaintiff.

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The defendant offered to show by parol evidence the alleged agreement that the rings were also delivered to him to secure the husband's debt. This offer was objected to by the plaintiff, on the ground that the evidence tended to show an agreement void under the statute of frauds, and also on the ground that it tended to vary materially the written contract between the parties. The court sustained the objection and excluded the evidence, to which ruling the defendant excepted.

If either of the objections was good, the ruling was correct. The note and the receipt are parts of one entire transaction, and they are to be construed as such, and if complete on their face the offered evidence was not competent. If it appears upon the face of a written instrument that the parties did not intend it to be a complete statement of their whole contract, parol evidence is competent to prove a separate agreement as to any matter in which the writing is silent, which is not inconsistent with its terms. The test of completeness of a written contract is the writing itself, and parol evidence to show that the written contract is incomplete is not competent. Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co. 66 Minn. 156, 68 N. W. 854; Potter v. Easton, 82 Minn. 247, 84 N. W. 1011.

There is no doubt as to the correctness of these general rules, but some confusion has arisen in their application to particular cases by a failure to give full effect to the rule that the incompleteness of the written contract cannot be shown by parol evidence, thereby in effect abrogating the parol evidence rule. The defendant here urges that the contract in question is incomplete on its face, in that the subject-matter of the contract was the redemption of the rings of which nothing is said in the writing. It is obvious that the writing affords no basis for this claim, for the subject-matter of the contract was the bailment of the rings, and the law implies an obligation on the part of the bailee to return them to the plaintiff upon the performance of the condition upon which they were delivered to him. The terms and conditions of a written contract implied by law are no more subject to variation by parol evidence than the express terms of a contract. Dunnell, Minn. Digest, § 3386.

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The contract in question, read in connection with the legal implication arising from its express terms, is neither uncertain nor incomplete on its face. It is a clear and complete contract, whereby the plaintiff obligated herself to pay the $105, with interest, within the time limited, and to permit the defendant to have possession of the rings to secure such payment. The defendant on his part obligated himself to return the rings to the plaintiff upon making such payment, the condition of the bailment, subject only to the express stipulation that he would not be responsible for the rings in the case of their loss by robbery or by fire.

It is clear that to permit the defendant to show by parol evidence a further condition of the bailment, to the effect that the rings were also to be held as security for the payment of the husband's debt, would be a palpable violation both of the letter and spirit of the parol evidence rule. The defendant's offer of parol evidence, reduced to its lowest terms, was simply an offer to show another condition, agreed on at the time the contract was made, qualifying the terms of such contract. Such being the case, the offered evidence was not admissible for the purpose of showing the consideration or inducement upon which the defendant loaned the $105 to the plaintiff, or for any other purpose. Wemple v. Knopf, 15 Minn. 355, (440) 2 Am. Rep. 147; Kessler v. Smith, 42 Minn. 494, 44 N. W. 794; Bruns v. Schreiber, 43 Minn. 468, 45 N. W. 861; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399; McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467, 116 Am. St. 389; Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L.R.A.(N.S.) 492.

It follows that the trial court, for the reasons we have stated, did not err in sustaining plaintiff's objection to the offered evidence. Whether the proposed evidence tended to show only a contract void within the statute of frauds, we have not considered.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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CARLTON COUNTY FARMERS MUTUAL FIRE INSURANCE COMPANY and Another v. FOLEY BROTHERS and Others.[1]

February 2, 1912.

Nos. 17,376—(204).

Fire — liability for act of independent contractor.

Where the owner or occupant of lands causes or permits fire to be set thereon to accomplish a desired result under such conditions that the act of then setting such fire necessarily endangers the property of others unless proper precautions are taken, a duty arises to take such precaution, which cannot be avoided by delegating the work to an independent contractor.

Same — charge to jury.

Held, that the agreement between a railway company and others in this case for constructing a railway is not of a character to require, in so far as it relates to the setting and escape of the fire which resulted in the destruction of plaintiffs' property, an instruction to the jury that the relation of independent contractor existed between any of the persons doing the work upon such construction.

Same — misconduct of counsel.

No prejudicial errors appear in the instructions given, the refusal to give requests, or upon the rulings at the trial. Nor does it appear that the improper remarks of counsel, which the jury was fully admonished to disregard, resulted in prejudice to defendants.

Action in the district court for Carlton county by plaintiff insurance company and Samuel B. Smith against Foley Brothers, Foley Brothers, Larson & Co. and Minneapolis, St. Paul & Sault Ste. Marie Railway Co., to have plaintiff company subrogated to the rights of plaintiff Smith to the extent of $3,200, the amount paid to him by plaintiff under its insurance policy; that plaintiff company have judgment against defendants for that sum and interest, and that plaintiff Smith have judgment for $11,463.

[1] Reported in 134 N. W. 309.

[Note] Liability of employer for acts of an independent contractor in setting out fire, see note in 17 L.R.A.(N.S.) 788.

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The complaint alleged that certain personal and real property of plaintiff Smith was destroyed by fire; that plaintiff company adjusted the loss thereon with said Smith and paid him a sum aggregating $3,200; that defendants trespassed on the land and in clearing a right of way for defendant railway company across the land piled logs, trees, brush and stumps in numerous piles for the purpose of burning the piles in order to prepare the right of way for grading; that a prolonged drought had existed in the vicinity and the piles, trees, brush, grass, leaves and vegetable mould were unusually dry and in a highly inflammable condition so that a fire could not be kindled without great danger of loss and damage to forest trees and other property; that these conditions were well known to defendants; that notwithstanding these conditions defendants negligently kindled fires in said piles and left such fires unguarded, whereby the fires spread into the forest land and destroyed the trees and wood thereon, and subsequently spread to and burned the property of defendant Smith; that said season of drought was one of high winds; that in view of the prolonged drought and high winds defendants should not have set fires and should not have left them unguarded after they had set them.

The defendants Foley in their separate answer denied that they ever kindled any fires at any time, and expressly denied that they ever left any fires unguarded or trespassed upon any land, and denied that they caused plaintiffs or either of them any loss.

The amended answer of defendant railway company admitted entering into an agreement with defendants Foley for the construction of a new line of railway and alleged that the Foleys sublet the whole or portions of the work to subcontractors; that the work was exclusively performed by defendants Foley and their subcontractors, and the answering defendant did not use or exercise any control over the work of construction. It also alleged that defendants Foley and their subcontractors agreed to indemnify and save the answering defendant harmless for all claims for damage to the property of others by reason of said work, or any negligence on the part of defendants Foley and their subcontractors and laborers.

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The amended reply to the amended answer of the railway company alleged that the subletting mentioned in the answer was subject to the approval and control of the defendant railway company, was also subject to the terms of the agreement between the railway company and its contractor which vested complete supervision and control as to the time, place, method and manner of performing the work in the defendant railway company, and that defendant exercised the rights so reserved to it, and that agreement provided that the subcontractor should be regarded as the foreman of the contractor; that so far as the contract and subcontracts affected the rights of plaintiffs the same were illegal.

The amended reply to the answer of defendants Foley alleged that, if defendants Foley sublet any portion of the work mentioned, any such subcontractors were the servants, agents and foremen of such contractor and required such subcontractors to perform the work in accordance with the contract and specifications between defendant railway company and defendants Foley; that the contractor retained the right of supervision and control of the work of such subcontractors and gave its bond of indemnity to defendant railway company to indemnify it against loss or damage by reason of the work performed under the contract; that so far as the performance of the work affected the rights and interests of plaintiffs it was illegal.

The case was tried before Dibell, J., and a jury which returned a verdict in favor of plaintiffs and against Foley Brothers, Larson & Company and the railway company for $6,255.90; of which sum $3,707.20 was awarded to plaintiff insurance company and $2,548.70 to plaintiff Smith. From an order denying defendants' motion for a new trial, they appealed. Affirmed.

Harris Richardson and *Harold C. Kerr*, for appellants.

H. S. Lord, for respondents.

HOLT, J.

Plaintiffs had a verdict against the defendants on the ground that through their negligence property belonging to one of plaintiffs and

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part thereof insured by the other had been destroyed by fire. From an order denying a new trial the defendants appeal.

These facts appear: Plaintiff Smith, in September, 1908, was in possession of section 17, township 47 north, range 16 west, Carlton county, Minnesota, claiming to be owner thereof. Certain buildings and personal property were on the land, and were destroyed by a fire on September 3, 1908. The other plaintiff, an insurance company, paid the loss to Smith on certain property covered by its policy, and asked to be subrogated to Smith's right to the extent of the loss so paid, namely, $3,200.

The defendant railway company was then building a line of railway from Brooten to Duluth, and had started the undertaking the year previous. This line or right of way taken by the railway company ran about one-quarter of a mile south of plaintiff Smith's land. A written contract for clearing, grading, and constructing the roadbed was entered into between the railway company and the other defendant, dated March 7, 1907. On October 14, 1907, the defendant Foley Brothers, Larson & Co. sublet a part of the work, being the locality involved in this action, by a written agreement in which the contract with the railway company was incorporated as a part, to one J. E. Edwards. It is inferred that Edwards gave the clearing of the right of way to J. K. Olson, and the latter's foreman, John Tischart, on September 1, in clearing the right of way set the fire which plaintiff Smith claims escaped, through the defendant's negligence, and destroyed the property.

The theory upon which the learned trial court submitted the case to the jury is clearly and tersely stated in the charge in these words: "If you find from the evidence that the defendants caused the right of way, including that portion of it passing through Kadel's land, to be burned about the first of September, 1908, that the fire spread and burned Smith's property, that at the time the material along the right of way was exceedingly inflammable; that the burning at the time and under the conditions then prevailing was in itself inher-

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ently and intrinsically and necessarily dangerous and was likely to result in injury to nearby property of others, that such was a natural and probable consequence under the existing conditions; that the defendants knew all this, that the conditions then prevailing and the natural and probable consequence of the burning of the right of way at the time were such as to cast upon the defendants the duty, if the right of way was to be burned then, of seeing to it that precautions were taken to prevent a fire spreading and injuring nearby premises, and that, nevertheless, without exercising any precautions to avoid doing injury to the premises of others, and without seeing to it that those directly concerned in the burning exercised care, the defendants caused the work on the Olson contract to be resumed and the burning to be done, and Jack Tischart negligently started and cared for the fire, and because of his negligence it destroyed Smith's property, then there should be a verdict for the plaintiffs; otherwise, there should not be."

The motion for a new trial occupies twenty-four pages in the paper book, and the forty-eight assignments of error, with subdivisions, are of such length that it is not expedient to set them out in full or consider them separately in this opinion. The merits of the case may, however, be considered upon these propositions:

(1) Were the defendants entitled to direction of a verdict in their favor on the proposition that Foley Brothers, Larson & Co. were independent contractors, or that so were J. E. Edwards and J. K. Olson?

(2) If any responsibility attaches to defendants from the acts of Tischart, is there any evidence showing that the fire set by him escaped to and destroyed plaintiff Smith's property?

(3) Did the court err in instructing the jury or refusing to give requests asked by defendants?

(4) Are there erroneous rulings upon reception or rejection of evidence? And

(5) Was there misconduct of the plaintiffs' counsel, entitling defendants to a new trial?

Two objections which do not go to the merits of the controversy

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should be first noticed. The defendants claim that plaintiffs have no ground to stand on because (a) Smith did not prove title in himself to the land, and (b) the railway company had no title to the location where the fire was started, and when it did get title afterwards to a right of way it was moved south of the first-mentioned location.

Possession of real estate is prima facie evidence of ownership. See cases cited in Stevens v. Town of Sandnes, 108 Minn. 271, 121 N. W. 902. It is not apparent wherein the defendants would be placed in a more favorable position to plaintiffs' demands if it were assumed that their occupancy of the strip of land from which the fire escaped to the property of plaintiff Smith was wrongful. The facts shown in the evidence indicate clearly that early in the year 1908 the defendant railway company and its servants and contractors had taken possession and occupied, for the purpose of constructing a railway thereon, a strip of ground one hundred feet in width through the northeast quarter of section 19, owned by one Kadel, being the section immediately south of plaintiff Smith's land. Between the date of the fire and the delivery of a deed from Kadel to the railway company, the location of the railway line was changed by straightening a curve, so that the part which had been first cleared, and upon which the fires were set which escaped to plaintiff Smith's property, was left a little north of the present right of way. The taking of possession and occupancy of the so-called right of way over Kadel's land in the first instance by the defendants should be presumed to have been rightful, and that it was with the consent or acquiescence of those who had any lawful right to object.

The defendants having had possession and exercised dominion over the strip from which a fire escaped and destroyed the property of plaintiff Smith, as found by the jury, did they, under the circumstances of this case, owe any duty in regard to the setting and caring for such fire?

Great calamities have come upon this state through prairie and forest fires, and, to avert the damage and injury which may result to individuals and communities from careless setting of fires or negligence in permitting fire to escape from premises of an own-

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er or occupant, several enactments now on the statutes fix penalties. While such statutes have no bearing here, because the trial court instructed the jury, at defendants' request, that the action was not based on any statute, it is an indication that under certain circumstances care is required in handling an element which, though indispensable and beneficent in its proper use, so often becomes fearfully destructive to life and property when it gets beyond control. And it would seem that one in the ownership or control of lands may not, without regard to the danger he thereby exposes the property of others to, contract for the destruction by fire on his own premises of waste or materials not wanted. If he selects a time for doing such work when the conditions are such that the property of others is necessarily exposed to destruction, unless special precautions are taken to prevent it, he must be held negligent if he fails to exercise proper care in the premises.

The principle announced by the trial court in the charge above quoted is but another expression of the maxim "Sic utere tuo ut alienum non lædas," and has support in the following cases: Black v. Christchurch [1894] A. C. 48: "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbor's property. 'Sic utere tuo ut alienum non lædas.' And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise, he will be responsible for the consequences." St. Louis v. Madden, 77 Kan. 80, 93 Pac. 586, 17 L.R.A.(N.S.) 788; St. Louis v. Yonley, 53 Ark. 503, 14 S. W. 800, 9 L.R.A. 604; Cameron v. Oberlin, 19 Ind. App. 142, 48 N. E. 386.

It is nothing but good common sense that an owner should not be permitted to escape liability for the consequences of an undertaking on his own premises which, in its execution, is necessarily fraught with imminent danger to the property of others by merely letting the contract to a so-called independent contractor. The defendant

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railway company evidently realized this, because the contract makes provisions for retaining out of the earnings of those who do the work such sum as may be necessary to pay for damages done to others.

Moreover, the railway company, under its contract, had the undoubted right to stop any work at any time, to start it again, and to direct the manner of its performance. It stopped the clearing at a time when it could well have been done without danger to adjacent property. It was started again after a protracted drought, and at a season when fires upon or near lands of the description surrounding this right of way are extremely dangerous. There is sufficient in the record upon which to base a finding that the work of clearing was resumed on September 1, 1908, at the instance of the defendants. The right to control and the duty so to do under the conditions then existing, easily distinguish this case from Shute v. Princeton Township, 58 Minn. 337, 59 N. W. 1050, wherein it is stated that:

"Pinz was an independent contractor, and the town reserved no right, and made no effort, to direct the manner in which he was to perform his part of the contract. He was to do certain work upon the road, including the burning of the brush, an innocent and lawful act in itself. At what time and under what circumstances he should do this was wholly within his control."

It was a question for the jury whether, at the time the work of clearing was directed to be resumed, the conditions were such that due care for the rights of adjacent property owners required the defendants to take any precaution to prevent fire from spreading, if it was then to be used to clear the right of way. In our opinion the case was submitted to the jury upon quite as favorable a theory to the defendants as they were entitled to.

It is earnestly contended that the court erred in not directing a verdict for the defendants, and in refusing a new trial, on the ground that Foley Brothers, Larson & Co. were independent contractors, and so were J. E. Edwards and J. K. Olson, for whom Tischart worked. There is very little left to the control and independent action of Foley Brothers, Larson & Co. in the contract. It would seem more correct to term them servants. They were to sublet all

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the work, the contracts therefor to be approved by the railway company, this presumably to include the price to be paid. They were to personally superintend the work and receive a percentage for their compensation upon the price paid the subcontractors. All such subcontractors were to be considered foremen of Foley Brothers, Larson & Co. If, as between the railway company and its contractors, J. E. Edwards and J. K. Olson were merely foremen, so that the company could treat them in relation to the work as servants of the contractors, it would seem to follow that third persons who suffer from acts done while engaged in that work should also be permitted to consider them foremen of the contractors.

It is undoubtedly true that reserving supervision of a job and directions in its execution to an extent necessary to secure its performance in accordance with the contract will not destroy the independent character of the contractor. But, taking this contract by its four corners, it is difficult to escape the conclusion that Foley Brothers, Larson & Co. were hired as managers and superintendents of the railway company, and were to receive a percentage upon the cost of the construction of the line, they to personally superintend the work of the subcontracting foremen under the direction and control of the railway company as to time, amount, mode, and manner of the work. We quote from the contract of the railway company:

"All directions and instructions given by assistant engineers, inspectors, or other persons appointed by the party of the first part, or their chief engineer, during the construction of the work covered by this contract must be fully carried out. * * * Said party of the second part also hereby agrees to conform in all respects to the directions and instructions of said chief or assistant engineers or parties of the first part, relative to the said work, and shall progress with the same at such time or times, in such manner, and at such particular points on the line of said work, as said chief or assistant engineers shall direct." "The said party of the second part agrees * * * to prosecute the same [work] with such force and means as will, in the opinion of said chief engineer or assistant, insure the completion, * * * to be subject at all times during the progress

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of said work to the directions of the chief or assistant engineers, or party of the first part, as to the mode of doing the same. * * * Said second party * * * agrees not to assign or transfer this contract, or relet any of said work, without the written assent of said first party, but shall constantly superintend said work in person. Said second party also agrees not to employ any men, either as overseer or laborer on said work, who shall have been dismissed from any other work for bad workmanship, intemperance, or disorderly conduct, but shall, whenever directed by said chief or assistant engineers, dismiss any and every person who is disorderly, intemperate, quarrelsome, unfaithful, or unskilful."

In regard to the work of clearing, which Tischart was engaged in when the fire was used, it provides: "The right of way belonging to the railway company for 100 feet in width * * * shall be cleared of all trees, brush, logs, and fences, all suitable timber to be cut into wood, ties, piling, or saw logs, if the engineer shall so direct, and all brush and rubbish, together with logs not cut as above, shall be burned up, without injury to adjacent property."

One other matter already referred to is significant of the relations between the railway company and Foley Brothers, Larson & Co. A contractor undertakes a work for the profit there is in it to him. If he sublets it, he seeks the lowest bidder, in order to increase his gain. In this case the advantage in seeking the lowest bidder for the actual construction went to the benefit of the railway company, and necessarily decreased the profit or compensation of Foley Brothers, Larson & Co., for the latter were to be paid a percentage of the actual cost. The outfit used by the contractor in the construction was rented to the railway company at certain compensation. There are many other features in the contract which confirm the view above expressed that Foley Brothers, Larson & Co. were, as to the prosecution of the work, superintendents and managers of the railway company, and in its behalf made contracts with others for the work, directing them as foremen. At least, this view is correct as to all matters involved in this action, so that it was not proper to give the

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jury the instructions asked by defendants in regard to independent contractor, or define the legal meaning of that term.

The foregoing covers all the errors assigned on the charge and refusal to give requests except this: The court refused to give request No. 14 of the defendant, which reads:

"There can be no recovery for damages to standing trees on the northeast quarter of section 17. It appears that some were blown down by the wind before the fire"—and request No. 15:

"There can be no recovery for standing trees."

We think these requests were sufficiently covered in the charge in this language: "Some evidence has been given as to the value of various buildings, and as to the value of certain standing timber, and as to the value of fences, and as to character and construction of certain bridges. These are all a part of the land. Evidence as to them has been received, because of furnishing to you side lights, or aids, if they do, in getting at the value of the land. You are to get at the damages to the land by comparing the value before and after the fire. * * * You cannot give damages for any injury which came by the wind blowing down standing timber."

The court instructed the jury, in effect, that if plaintiffs were to prevail the insurance company was entitled to recover the amount it paid under its policy, but not in excess of the amount of damage done to the different items insured. The amount of the policy was $3,200. Two hundred dollars thereof was on wearing apparel, and it is claimed only $8 worth of wearing apparel was burned; hence, the full amount of the policy being allowed by the verdict, it must be reduced $192. We do not think it concerns the defendants how the verdict is apportioned between plaintiffs. The jury found that the value of plaintiff Smith's property destroyed through defendants' negligence was $6,255.90. The only one that can complain of the fact, if it be so, that the insurance company should have less and Smith more by $190, is manifestly plaintiff Smith, and not either of the defendants.

We have examined the record with care, and are of opinion that the conclusion of the jury that the fire set by Tischart on the right of

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way of the railway company was the fire that was permitted to escape and destroyed plaintiff Smith's property is not mere conjecture, but finds ample support in the evidence.

We have examined the errors assigned on the reception of evidence objected to by defendants, and find no prejudicial error in the record.

It is evident that in the closing address to the jury plaintiff's counsel made statements which ought to have no place in a court of justice; but the trial court at once, upon his attention being called thereto, fully and emphatically instructed the jury to disregard the remarks. Upon the record as made, and the trial court's judgment that no prejudice resulted to defendants, we are not inclined to regard the obnoxious words of such serious consequence to the rights of the defendants that a new trial should be granted on that ground.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

CHARLES BUTTS v. PACIFIC SURETY COMPANY OF CALIFORNIA.[1]

February 2, 1912.

Nos. 17,283—(200).

Default of defendant's principal.

The evidence examined, and *held* to sustain the finding that plaintiff's contractor, whose performance the defendant by its bond guaranteed, had defaulted.

Action in the district court for Ramsey county to recover $6,200; to have a certain mortgage canceled and that defendant be restrained from assigning and disposing of the mortgage. The case was tried before Bunn, J., who made findings and as conclusions of law ordered

[1] Reported in 134 N. W. 306.

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judgment in favor of plaintiff for $2,550. From an order Hallam, J., denying defendant's motion for a new trial, it appealed. Affirmed.

James D. Denegre and *Thomas McDermott,* for appellant.

W. H. Williams, for respondent.

HOLT, J.

This action is upon an indemnity bond given by the defendant to plaintiff to insure the performance of the contract of J. P. Oase to remodel a building for plaintiff. The action was tried by the court without a jury, and resulted in findings that Oase breached and abandoned the contract, and that plaintiff sustained damages in the sum of $2,550, for which sum judgment was given against the defendant. A motion for a new trial being denied, the defendant appeals.

The uncontroverted facts are these: Plaintiff made a contract September 12, 1908, with John P. Oase, under the terms of which the latter agreed to remodel and add to a brick building owned by plaintiff at St. Paul, Minnesota. The defendant executed and delivered an indemnity bond to plaintiff in the penal sum of $3,900 to secure the faithful performance by Oase of the contract. Alfred H. Wheeler was plaintiff's architect, and had supervision of the work. The work was to be completed by November 25, 1908. Plaintiff agreed to pay $2,800 cash, in instalments, upon the architect's orders, and the balance by note secured by second mortgage on the property. The work progressed, and the architect issued and delivered an order to Oase, showing him entitled to receive $1,200 on the contract. No more than $497 of this order was paid.

The defendant claims that plaintiff breached the contract with Oase in failing to pay this order. Hence there is no liability on the bond. Plaintiff contends that Oase, in the work performed, did not conform to the contract, refused to make it conform, and abandoned the work. The court found, upon this issue, in favor of plaintiff. The defendant at the oral argument, stated that this find-

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ing is the only one assailed, and, if the evidence sustains it, the order appealed from must be affirmed.

The defendant is a foreign insurance company, and its resident general agent was Maurice P. Moriarity, who, with James D. Denegre, duly appointed resident secretary, executed the bond. A bond had also been given by the defendant to a mortgagee to protect against liens. Some delay occurred in obtaining the funds for the building from this mortgage loan, because of an alleged defect in the execution of the first mortgage.

Plaintiff also claimed that Oase was not doing the work according to the contract, and was dissatisfied with the architect, Wheeler, resulting in the latter withdrawing. When these disputes arose, plaintiff contends that he obtained a promise from Oase that, if plaintiff paid him $500 upon the $1,200 order or estimate of the architect, Oase would pay his men, remedy the defects in his workmanship, and proceed with the work; that plaintiff thereupon paid $497, but Oase did not use it as agreed, and insisted that he would not go on with the work unless the balance on the estimate was paid and the work accepted, so far as then done, as a compliance with the contract. There is also testimony tending to show that the work done was much inferior, both as to workmanship and material, to that called for by the contract, and that the value of what was then done was far below the estimate given by the architect. There is also testimony indicating that Moriarity recognized that Oase had failed to carry out the contract, and that defendant was under obligations to protect plaintiff.

Of course, these contentions of plaintiff are disputed, but we are of opinion that, not only is there basis for the finding that Oase violated the contract, but that the evidence abundantly sustains the conclusion of the learned trial court to the effect that Oase breached and abandoned the contract, and not plaintiff.

It is not necessary to determine whether or not Moriarity was a general agent of the defendant, so that the latter is bound by what he did subsequent to the delivery of the bond sued on, because, if the finding stands that Oase, and not plaintiff, defaulted on the con-

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tract, defendant's liability is established, and nothing more remains except to determine the amount. The amount is not questioned.

The order appealed from is affirmed.

BUNN, J., took no part.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

MARGARET TORKELSON v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

February 2, 1912.

Nos. 17,407—(208).

Contributory negligence question for jury.

Plaintiff's intestate, in charge of a large crew reconstructing defendant's switchyard, in constant use for traffic, was struck and killed by a switch engine. *Held*, that the question of decedent's contributory negligence in failing to notice the approach of the engine, by reason of being absorbed in the discharge of his duties, was for the jury.

Point not available on appeal.

Failure of the court to give a full and complete definition of negligence in the charge cannot be taken advantage of upon appeal, where no assignment of error is predicated thereon in the motion for a new trial.

Modification of charge.

Where exception is taken to a particular statement in a charge, and the court thereupon modifies the charge to meet the objection raised, and no exception is taken to the modification so made, it will be considered that the modification was acceptable. *Held*, also, that the modification made, when considered in connection with the whole charge and the evidence, was not prejudicial to appellant.

[1] Reported in 134 N. W. 307.

[Note] Duty of employee engaged in repairing or cleaning track to look out for his own safety, see note in 6 L.R.A.(N.S.) 646.

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Action in the district court for Waseca county by the administratrix of the estate of Nels Torkelson, deceased, to recover $5,000 for the death of her intestate. The negligence complained of was that defendant and its servants failed to give any warning or signal of the approach of the train and engine by ringing the bell or sounding the whistle, and the train was running at an excessive speed. The answer alleged want of care on the part of decedent. The reply was a general denial. The case was tried before Childress, J., and a jury which returned a verdict in favor of plaintiff for $5,000. From an order denying defendant's alternative motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. H. Bremner, F. M. Miner, P. McGovern and *George W. Seevers,* for appellant.

Charles Spillane, F. E. Clinite and *Moonan & Moonan,* for respondent.

HOLT, J.

This action was brought to recover damages for the negligent killing of plaintiff's intestate, Nels Torkelson, on October 17, 1910. The trial resulted in a verdict for plaintiff. Thereupon the defendant made the blended motion for judgment notwithstanding the verdict or for a new trial. An order was made denying the motion in toto, and from this order the defendant appeals.

The grounds now urged for reversal are these: (1) The deceased, Nels Torkelson, was as a matter of law guilty of contributory negligence. (2) The court gave erroneous instructions to the jury.

An outline of the situation may be thus stated: Nels Torkelson had worked for the defendant upon or about its railway tracks for fifteen years prior to the accident resulting in his death. During the last seven years he was foreman. In the summer and fall of 1910 the defendant was rearranging and rebuilding its yards at Cedar Lake, in Hennepin county, Minnesota, and Torkelson was in charge of the crew doing the work. In the forenoon of October 17, 1910, the day of the accident, he had some sixty men working under

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him, mostly Greeks, so that he had two assistants who were conversant with that language to aid in directing the men. A new lead track was being constructed, with ten or more yard tracks branching out from it, and since it was laid near and almost parallel to the old, it necessitated cutting and tearing out the yard tracks or spurs branching out from the old lead track. But since the handling of defendant's traffic required constant use of the yard, the old tracks were left and used till it became imperative to remove some portion thereof in order to construct the new. Near the south end of the lead track, the yard track designated as No. 9, branched off, and the fifth yard track, counting north from No. 9 and known as No. 4, diverged from the lead about five hundred feet north of No. 9.

At about 11:10 a. m. on the day mentioned, the deceased was standing a little northeast of the switch for No. 9 track just referred to, and gave some directions to his assistant. At that time a switch engine passed going northerly on the lead track to yard track No. 4, went upon last-named track, was coupled to eight loaded cars, pulled back onto the lead track, and proceeded south at the rate of from six to ten miles an hour. To the south was upgrade. The locomotive was coupled to the cars, so that the tender was in front in going south.

As the tender approached switch No. 9, Torkelson, according to the testimony of the engineer, was then on the east of the lead track, walking toward the southwest near the track, and evidently about to cross diagonally at the switch, or, according to other evidence, he was standing between the rails near switch No. 9, examining the track about to be torn up at that point. There is also evidence to the effect that part of the duties of Torkelson was to examine the rails and material torn out, and select such as could be used in the new construction. There was a curve in the lead track, and also in yard track No. 4; but, had the deceased looked toward the north, he could have seen the approaching train in ample time to get out of its way. As he thus stepped between or stood between the rails, he appeared to be unconscious of the oncoming train, and was struck down; the forward wheels of the tender running over and killing him. He was a

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competent foreman, evidently aware of all the dangers incident to the work in a switchyard in constant use. He was in prime of life, active, and in full possession of the senses of sight and hearing.

In the motion in the court below error was assigned on the ground that there was no evidence of any negligence of the defendant. This was not pressed upon the oral argument in this court, and counsel may have intended to abandon it, for this statement occurs in appellant's brief: "All of the assignments of error involve the same propositions as they all relate to the question of the negligence of plaintiff's intestate and the degree of care required of him under the circumstances." It may, however, be stated that one of the negligent acts alleged in the complaint was failure to give the customary warning of the approach of the train by ringing of the bell. The fireman whose duty it was to ring testified that it was not rung, because he was otherwise engaged, and persons within fifteen to twenty-five feet of where the locomotive passed just before Torkelson was run down also testify to the same effect. Furthermore, there is evidence of the custom to warn by use of the bell persons who were at work in the yard. It is therefore manifest that the question of defendant's negligence or failure to give the customary warning was for the jury. This was the only item of alleged negligence submitted to the jury.

The defendant insists that Nels Torkelson was, as a matter of law, guilty of contributory negligence. We cannot agree to that. It is true that in railroad yards employees, who are required to cross and go upon tracks where locomotives and cars constantly pass, must exercise care and vigilance commensurate with the grave dangers surrounding them. The decisions to this effect are so well known that citations are unnecessary. The difficulty is found in applying the rule to the circumstances of each case. Railroad employees must work upon and around tracks where engines and cars run. Some work is such that the employee can give all his attention to his own safety in passing over tracks. In other work his attention must, in a greater or less degree, be engrossed on the particular matter in hand, and thereby diverted from approaching danger. When the use of the eye is demanded upon some particular item of work in a certain

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direction, we depend to a large extent upon the sense of hearing to apprise us of what may threaten from other directions. This is understood, and therefore the custom prevails of giving signals by sound, such as the ringing of a bell, in a railway yard. The care required by an employee of a railway company working in and about a switch yard depends on such a variety of facts and circumstances, some of which may be in dispute, that rarely may it be said, as a matter of law, that contributory negligence exists.

The appellant confidently points to the cases of Sours v. Great Northern Ry. Co. 84 Minn. 230, 87 N. W. 766, and Magliani v. Minnesota Transfer Ry. Co. 108 Minn. 148, 121 N. W. 635.

In the Sours case no construction work was going on in the yard. Hence Sours had no right to assume that engineers were on the lookout for men absorbed in such duties that they could not all the time keep their eyes on moving objects about them. Sours had just one thing to do—to carry a lantern across a number of tracks. The lantern needed no care. He saw cars shunted and trains moving. His whole attention should have been devoted to his own safety. He testified, and upon the facts told by him, and the physical situation, the court held rightly that contributory negligence precluded a recovery.

In the Magliani case it appears that the deceased had quit the work, had nothing to do except to proceed to the boarding car, could select a path of perfect safety outside the tracks, but chose either to walk on a track which was in common use, or stepped onto it in front of the approaching locomotive without using his eyes. The syllabus in that case clearly indicates that the evidence in the present case makes it the province of the jury, and not the court, to say whether Nels Torkelson was negligent in taking the position he occupied when struck, or in failing to notice the approaching train.

We must assume that he realized the dangers in the yard, that he possessed the usual desire of men to avoid bodily injuries and death, and to that end used his faculties. It was for the jury to say to what extent he could devote his eyes to the work in hand, in view of the fact that train crews knew that a large number of men were

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engaged in work upon and near the tracks, and that warning by the ringing of bells was customarily given, and also to what extent the proper discharge of his duties necessarily engrossed his attention. These conditions, and also matters in dispute bearing upon the question of his conduct and position at the time of the accident, make it impossible for a court to say, as a matter of law, that Torkelson failed to use that care which the ordinarily prudent person would use in the same situation.

The facts in the instant case present a situation more like that in Floan v. Chicago, M. & St. P. Ry. Co. 101 Minn. 113, 111 N. W. 957, than in either the Sours or Magliani cases above cited. What is said in Erickson v. St. Paul & Duluth R. Co. 41 Minn. 500, 43 N. W. 332, 5 L.R.A. 786, is also applicable here.

The charge is subject to criticism, in that the proper and usual definition of negligence was not given, and in that the court stated that certain evidentiary matters, if found true, constituted negligence or freedom from negligence as the case might be. The legal definition of negligence and contributory negligence should be given, and then the jury are to decide whether or not the facts disclosed by the evidence bring the acts of the party charged with negligence or contributory negligence within such definition. But in the motion for a new trial no assignment of error was predicated on the claim that the court did not give the jury a standard to go by in determining Torkelson's alleged contributory negligence or defendant's negligence. Hence that fault in the charge cannot now be considered.

The defendant presented no request to instruct the jury, but at the close of the charge this took place:

"Mr. Bremner: The defendant excepts to each and every one of the instructions given by the court, and particularly excepts to that instruction to the effect that the burden of proving that the plaintiff's intestate was not engaged in the performance of his duty rests upon the defendant. We will save a general exception to the whole charge."

After a recess: "Present: The same as before. The Court: Gentlemen of the jury, my attention has been called to a possible

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mistake that I made in giving you the charge. In order to be sure about it this time, I have written down just what I want to say. I did not intend to say that the burden of proving that deceased was not engaged in the performance of his regular duties, at the time of the accident, is upon the defendant. What I intended to say was this: The test in this case of contributory negligence is this: Was the deceased at the time of the accident engaged in the performance of his regular duties? If he was not, he was guilty of contributory negligence; but the burden of proving contributory negligence is upon the defendant." No exception was taken to this modification made to meet the appellant's special objection to the charge.

This modification was not, perhaps, accurate, and in certain respects too favorable to the defendant. There can be no doubt that Torkelson was engaged in the performance of his duties when he was struck down, and it is likely that defendant was satisfied with the test which the court gave by which to judge the conduct of the deceased.

Taking the whole charge, it is clear that the court attempted to convey the idea to the jury that Torkelson was as a matter of law guilty of contributory negligence, unless he was at the time of the collision actually engrossed or absorbed in the performance of his duties, and did not charge that if he was merely engaged in such duties he was free from negligence; for the jury were told: "Men that are working about the tracks must take care of themselves. They must look out for themselves. * * * People who are upon the track, and have an unobstructed view of the trains that are approaching, must look out for themselves. * * * But in cases where people are working upon the track, and absorbed in their duties, the law does not hold them to strict accountability to this rule. * * * Such workmen, when engaged in their work, are required to use reasonable care for their own safety."

We conclude that, in so far as the charge was faulty by failure to define negligence and contributory negligence, it cannot avail defendant now, because not excepted to in the motion for a new trial, and that the modification given of the charge was tacitly acquiesced

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in by defendant, and in view of the whole charge and the evidence was not prejudicial to defendant. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754; Kramer v. Northwestern Elevator Co. 97 Minn. 44, 106 N. W. 86; Applebee v. Perry, 87 Minn. 242, 91 N. W. 893.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

STATE v. WOJCIECH POTONIEC.[1]

February 2, 1912.

Nos. 17,412—(4).

Homicide — evidence.

Defendant was convicted of murder in the second degree. It is *held:*

1. The verdict was justified by the evidence.

2. The court did not err in the admission of evidence or in its instructions.

Defendant was indicted and tried in the district court for Hennepin county for the crime of murder in the first degree. The jury found him guilty of the crime of murder in the second degree, and he was sentenced to hard labor in the state prison for his natural life. From an order, Hale, J., denying his motion for a new trial, defendant appealed. Affirmed.

James A. Kellogg, for appellant.

George T. Simpson, Attorney General, and *James Robertson,* County Attorney, for the State.

[1] Reported in 134 N. W. 305.

[Note] As to when confession is voluntary, see elaborate note in 18 L.R.A. (N.S.) 768.

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BUNN, J.

Defendant was tried on an indictment charging him with murder in the first degree, alleged to have been committed October 7, 1907, by strangling Anna Potoniec, his wife. He was convicted of murder in the second degree, and appeals from an order denying a new trial.

1. Defendant contends that the verdict was not justified by the evidence. We have carefully examined the record, and are unable to sustain this contention. Defendant and deceased were husband and wife, and for some time prior to October 7, 1907, lived together in rooms on the second floor of a building at 1215 Third Street North, in Minneapolis. On Monday, October 7, 1907, defendant packed his personal effects in a trunk and left for Chicago. On Sunday, October 13, the occupant of the ground floor of the building, having heard no movements in the rooms above during the week, unlocked the door and with two friends entered the rooms. They found Mrs. Potoniec lying dead on a mattress. She was dressed, and covered with a quilt. A cloth was tied tightly around her neck, knotted at the back and in front. Her face was swollen and black, and decomposition had begun. The cloth cut into the neck half an inch, and there was blood which apparently had come from the mouth of deceased. Mrs. Potoniec was last seen alive on October 7, and it was not contended that she did not die on that day. Three physicians testified that death was caused by strangulation. Defendant was indicted in November, 1907, and was arrested in Chicago in March, 1911. He at first gave an assumed name, but finally gave his correct name, and made statements to the officers, and afterwards to the county attorney, in which he admitted striking and choking his wife, throwing her down, and leaving for Chicago. A letter written by defendant to his mother October 10, 1907, was received in evidence. In this letter defendant stated that he had struck his wife in the face, that she had then taken poison and he left, not knowing whether she was dead or not. This outline is sufficient to indicate that there is no merit in the contention that the verdict of guilty was not justified. We hold that the evidence was amply sufficient to sustain the verdict.

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2. It is urged that the trial court erred in admitting the testimony of medical witnesses to the effect that in their opinions death was caused by strangulation. The claim is that this was an invasion of the province of the jury. We hold that the testimony was properly received.

It is argued that the constitutional inhibition that the accused shall not be compelled to testify against himself was violated by the admission in evidence of his statements made to the officers, and to the county attorney, and the letter to his mother. This point cannot be sustained, unless we hold that no confession of an accused person can be used against him because of this constitutional provision. Such a holding would have no basis in logic or common sense. An accused is not compelled to testify against himself when he makes a voluntary confession, and a confession is voluntary when it is not induced by a threat of harm or a promise of favor or reward held out by a person in authority. Clearly the evidence was admissible under this rule. State v. Staley, 14 Minn. 75 (105).

As defendant was acquitted of murder in the first degree, he was not prejudiced by any inaccuracy in the court's instructions as to premeditation.

Defendant complains because the jury was not permitted to find him guilty of manslaughter. There was no evidence to justify such a verdict, and the trial court was correct in informing the jury that it was their duty to convict of murder in the first or second degree, or acquit. State v. Nelson, 91 Minn. 143, 97 N. W. 652.

Order affirmed.

PHILIP E. BROWN, J., absent on account of illness, took no part.

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NORTHWESTERN TRUST COMPANY v. H. N. BRADBURY.[1]

February 2, 1912.

Nos. 17,423—(218).

Liability of stockholder to creditors.

The stockholder's liability created by section 3, article 10, of the state Constitution constitutes a reserve or trust fund for the benefit of creditors, and is enforceable only in sequestration or insolvency proceedings, in which all creditors are afforded an opportunity to be heard. Allen v. Walsh, 25 Minn. 543, followed and applied.

Not discharged by payment of assessment.

The liability is not discharged by the payment of an assessment upon the stock levied pursuant to orders given by the public examiner, acting under the provisions of section 3000, R. L. 1905; the assessment having been ordered on account of an impairment of the bank's funds, and to enable it to reopen its doors and continue its banking business.

Voluntary payment to one creditor.

Nor will the voluntary payment by a stockholder of the full quota of his liability to a particular creditor of the corporation relieve him from the payment of an assessment duly made in liquidation proceedings.

Action in the district court for Ramsey county by the receiver of the State Bank of St. Paul, to recover an assessment of $2,500 levied by that court upon the stock of defendant in the insolvent bank. The defense interposed is stated in the sixth paragraph of the opinion. The case was submitted upon an agreed statement of facts to Kelly, J., who made findings and as conclusions of law ordered judgment in favor of plaintiff for $2,500, and that the judgment have incorporated in it the following: "Provided that the defendant, in the event that the receiver is enabled to collect from assets of the State Bank of St. Paul, now considered worthless, or from other sources, sufficient so that it will not be necessary to use all of the

[1] Reported in 134 N. W. 513.

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amount collected from the defendant, on account of his stockholder's liability, to pay the debts of the bank outstanding on May 23, 1908, then and in that event the defendant may apply to the court either in this action or upon the application of the receiver for an order allowing his final account for an order directing the receiver to refund such part of the amount collected from the defendant pursuant to his judgment, as he may show himself entitled to upon a hearing, and the court hereby reserves power over its judgment to such an extent as may be necessary to protect the rights of the defendant hereunder." From an order denying defendant's motion for a new trial, he appealed. Affirmed.

A. B. Jackson, for appellant.

Because of radical differences between the provisions of the national bank law and the corporation laws of this and other states, and also because of radical differences between the policy of the Federal government respecting national banks of issue, and the policies of the states with respect to corporations in general, the decision in Delano v. Butler, 118 U. S. 634, 30 L. ed. 260, is not applicable.

In that case the complainant sought an injunction to restrain the prosecution of an action at law against him by the receiver of the Pacific National Bank of Boston. The complainant urged that a previous payment by him of an assessment of one hundred per cent which had been resolved upon and agreed to by the stockholders "by a vote that was almost unanimous," following a notice from the comptroller of the currency under R. S. § 5205, should be credited to him in discharge of the shareholder's liability imposed by section 5151. The Supreme Court of the United States held against this contention. The very brief disposition of the question in the case cited is placed on three grounds: (1) That the assessment under which Delano's payment was made was made "by the stockholders themselves, by almost unanimous vote, paid into the general funds of the bank, as a further investment in the capital stock, and disposed of by its officers in the ordinary course of business;" (2) that such payment might, or might not, have been applied to the payment of credit-

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ors, (the record being silent as to this), and the court saying that "in the ordinary course of business it certainly would not be applied, as in case of liquidation, to the payment of creditors ratably;" and (3) that "under section 5151 the individual liability does not arise, except in case of liquidation, and for the purpose of winding up the affairs of the bank," and the "equal and ratable" assessment provided for by section 5151 is (only) for the protection of those who may be creditors at the time of liquidation, is not voluntary, "and can be applied only to the satisfaction of the creditors ratably." For these reasons the court held that "the obligations of the shareholders under the two sections are entirely diverse, and payments made under section 5205 cannot be applied to the satisfaction of the individual responsibility secured by section 5151," citing Scoville v. Thayer, 105 U. S. 143, in which no such question was, in any manner, involved.

It is noticeable that none of the cases in the numerous state courts were referred to in the briefs of counsel in the Delano case, or, apparently, examined or considered by the court, though, as already suggested, the essential differences between the Federal statute and the corporation statutes or constitutional provisions of the several states may account for the apparent overlooking of these decisions.

Under the national bank law (section 5151) the shareholders are to be "held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," but this liability is solely for the benefit of those who may be creditors at the time of liquidation, and does not exist or arise (as held in the Delano case, and other cases), until after the bank has gone into liquidation under section 5220, or after the appointment of a receiver by the comptroller of the currency under section 5234.

It is quite logical and reasonable to say that a payment made at a time when no liability existed, under section 5151, and which may have been applied, so far as appears, to purposes quite remote from an equal and ratable distribution among the persons who may be

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creditors at the time of liquidation, and for whose exclusive benefit, the liability under section 5151 was created, cannot properly be credited on such liability when it subsequently arises. Under the Minnesota Constitution, however, as construed in many decisions of our court, the shareholder's liability attaches and exists from the moment of his purchase of stock, and, until recently, at least, might be enforced by any creditor, without waiting for general liquidation, so that the reasoning of the Delano case, on this point, is clearly inapplicable.

O'Brien, Young & Stone, for respondent.

BROWN, J.

The State Bank of St. Paul was a banking corporation duly created and existing under the laws of this state, the stockholders of which were subject to the liability created by section 3 of article 10 of the state Constitution. In January, 1908, the public examiner found the affairs of the bank somewhat impaired, and he ordered and directed the officers thereof to levy a stock assessment of fifty per cent. The directors of the bank duly complied with the order. Before the same was paid, however, further investigation resulted on January 18 in an order temporarily closing the bank, and on January 27 the examiner made a new order to the officers of the bank in the following language, namely:

"A thorough examination of the State Bank of St. Paul has just been completed, and the capital stock of the same found to be impaired to such an extent that an assessment of one hundred per cent is found necessary. You will therefore make such assessment and proceed to collect the same immediately, pursuant to section 3000, R. L. 1905, to the end that all depositors may be fully secured and that the bank may be continued in business."

The directors of the bank then rescinded the former fifty per cent assessment and made a new one for one hundred per cent, as required by this order.

Defendant in this action was not a stockholder of the bank when

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this assessment was levied, but became such soon thereafter, in the following manner: At the time the assessment was levied one Drew, a bankrupt, was the owner and holder of one hundred ninety shares of the stock, which was held by his receiver in bankruptcy. Defendant and others associated with him, acting through one Haas, purchased one hundred thirty-two shares of that stock from the receiver for the sum of $50, and it was divided among the several purchasers; defendant receiving twenty-five shares, of the par value of $100 each. The purchase of the stock was with full notice and knowledge of the situation at the bank and of the assessment levied upon the stock pursuant to the orders of the public examiner. Defendant and the other holders of the stock thereafter paid the assessment in full, and the bank reopened its doors for the transaction of its business, and thereafter continued a general banking business until September, 1908, when the public examiner again ordered the bank closed, and upon his application plaintiff herein was duly appointed receiver to wind up its affairs; it being found insolvent.

On April 13, 1909, on the receiver's application, the court below, under section 3, article 10, state Constitution, ordered an assessment of one hundred per cent upon the stock of the bank, and directed the receiver to proceed and collect the same for the benefit of the creditors. It further appears that, though the purpose of the assessment made pursuant to the order of the public examiner was to enable the bank to resume business, the funds derived therefrom were applied in payment of the bank's debts, as represented by the claims of depositors and others, and that there was no substantial change in the personnel of the creditors between that date and the final closing of the bank, though there were a few new depositors after the reopening of the bank.

This proceeding was instituted by the receiver to enforce payment of the assessment ordered by the court in the insolvency proceedings, and defendant interposed in defense the payment of the assessment ordered by the public examiner, the payment of which he insists fully discharged his constitutional liability. Whether this contention be sound presents the only question involved in the case. The court

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below ordered judgment for plaintiff, and defendant appealed from an order denying a new trial.

The argument of counsel in support of the contention that defendant's liability was fully discharged by the payment of the assessment ordered by the public examiner proceeds upon the theory: (1) That the payment was compulsory, for the benefit of creditors, and the result of the order of the public examiner; and (2) that, whether voluntary or involuntary, the defendant's liability was discharged, because the assessment was applied to the payment of the debts of the bank.

1. The constitutional liability of stockholders in banking corporations was designed solely for the benefit of creditors, and constitutes a fund available only when the bank is insolvent and unable to meet its obligations in full. The corporation itself has no authority over the fund, cannot compel its payment, nor by any act on its part release the stockholders therefrom. It amounts for all practical purposes to a reserve or trust fund, to be resorted to only in proceedings in liquidation, when necessary to meet the payment of obligations of the corporation. It is limited to an amount equal to the par value of the stock held and owned by each stockholder, and exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation. No single creditor can enforce payment of his debt against any one or more of the stockholders, because he has no several or independent right to the fund. There was a time, no doubt, as shown by many of the authorities cited by defendant, when the diligence of creditors and preferential payments by insolvents were favored by the law, at least not condemned; that individual creditors were permitted to proceed against a particular stockholder and compel payment by him of his entire debt, to the extent of the limited stock liability. Dodge v. Minnesota Plastic Slate Roofing Co. 16 Minn. 327 (368). But such is not now the law in this state. The decision in that case was rendered before the law upon the subject had become fully developed, and the precise point here under discussion does not seem to have been raised.

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Since the decision was handed down in the case of Allen v. Walsh, 25 Minn. 543, the law applicable to the enforcement of this liability has been in harmony with the general equitable principles governing the sequestration and distribution of trust funds. By that decision it was declared that the liability could only be enforced in proceedings brought for that purpose in behalf of all the creditors, and that this, being the remedy prescribed by statute, was exclusive. Though an apparent departure therefrom, the conclusion was fully justified by changes and amendments of the statutes subsequent to the decision in the Dodge case, and it has been uniformly followed and applied in all later decisions. 1 Notes to Minnesota Cases, 1239, and cases there referred to.

Nor was the decision in the Walsh or any of the subsequent cases predicated upon the general rule that, where a statute creates a right and prescribes a remedy for its enforcement, the remedy so provided is exclusive. It was held in all the cases referred to that the general statute applicable to winding up the affairs of corporations applies to all classes of corporations, and furnishes the exclusive remedy for the enforcement of the stockholder's liability. McKusick v. Seymour-Sabin & Co. 48 Minn. 158, 50 N. W. 1114; Winnebago Paper Mills Co. v. Northwestern Printing & Publishing Co. 61 Minn. 373, 63 N. W. 1024.

The case of Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926, 4 L.R.A. 745, 16 Am. St. 671, and the case of Nolan v. Hazen, 44 Minn. 478, 47 N. W. 155, are not in point. The Patterson case did not involve the stockholder's liability. The action was predicated upon section 23, c. 11, p. 126, Laws 1873, which provided that, if any corporation organized thereunder should violate any of its provisions, the directors ordering or assenting to the violation should be jointly and severally liable for all debts contracted after the violation occurred. The statute created a special liability, unlimited, and it extended to the full amount of the claim of each creditor independently, and not a limited liability, in which all creditors were jointly interested. The same situation was presented in the second case just

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cited. They do not apply, and are in no proper view a departure from the doctrine and rule of the preceding Walsh case.

So we are confronted with the general doctrine, repeatedly affirmed by the court, that the liability here involved can be enforced only in proceedings instituted for that purpose in behalf of all creditors, and that that remedy is exclusive of all others. From this situation of the law it would seem logically to follow that a stockholder cannot, by the voluntary payment of the full quota of his liability to a particular creditor or set of creditors, discharge his further responsibility. If that course were permissible and effectual, it would lead to confusion, in preferences, and to inequitable and unjust results. A trust fund designed for the benefit of all creditors would be thus unfairly distributed, and those most deserving, perhaps, deprived of the benefit the law intended to confer upon them, and the purposes of the law creating the liability wholly defeated. So we do not sustain the right of a creditor to so discharge his obligations.

We do not overlook the fact that many of the authorities cited by defendant sustain his view of the question. But they are not in harmony with the present policy of the law, and the rule invoked does not apply in any of the states where the liability is treated, as in this state, as a trust for the benefit of creditors without discrimination. 3 Clark & Marshall, Corporations, 2582.

Nor can it be held that the payment of the assessment made pursuant to the order of the public examiner operated as a discharge of the liability. This order was issued under and pursuant to the authority conferred by provisions of section 3000, R. L. 1905, which provides, in substance and effect, that whenever the capital of a banking corporation shall become impaired the officers thereof shall, within ninety days after receiving notice from the public examiner, make up the deficiency by a pro rata assessment on the capital stock, or go into liquidation. Section 3002 further provides that if any stockholder shall refuse to pay the assessment so ordered his stock may be sold in the manner directed.

Previous to the order by the public examiner his investigation into the affairs of the bank brought to light a material impairment of the

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bank's capital, and a compliance with the order for the assessment was a condition upon which the bank might reopen its doors and resume business. It was not a proceeding in the interest of creditors, but rather to place the bank in position for the future transaction of business. And whether the payment thus required to be made was voluntary or involuntary, it served its primary purpose, and on the funds thus acquired the bank was able to reopen its doors.

The contention of defendant that, to construe this statute as not a compulsory proceeding resulting, upon the payment of an assessment made thereunder, in the discharge of the constitutional liability of the stockholder, would render it invalid as in violation of constitutional rights, is not sound.

The business of banking so materially and vitally affects the general public interests as to make it a proper subject for complete legislative regulation and control. The sole purpose of this statute was to vest in the public examiner supervisory control over such institutions, and by timely action to prevent the impairment of their funds, to the injury and loss of depositors and others, and to keep and maintain them so far as practicable upon a safe and sound financial basis. That the power to so provide is within legislative discretion we have no doubt. Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062. The proceedings of the examiner were not in the interests of creditors, but to enable the bank to continue its business; and, though the funds thus acquired were applied to the payment of creditors, it must be held, unless we are to open the door leading to a defeat of the purposes of the Constitution in creating the liability, that the payment of the public examiner's assessment did not operate to discharge the liability. This view is sustained by Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. ed. 260.

It is true, as urged by counsel, that the stockholder is liable but once. He cannot be compelled to pay a second time. But this case does not present a situation of that kind, and it is unlike the case of Hunt v. Roosen, 87 Minn. 68, 91 N. W. 259. There the assessment was made under authority of a judgment of the court in proceedings

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to wind up the affairs of the bank, and the judgment expressly provided that the payment should release pro tanto the constitutional liability. The bank there involved did not continue in business, and the sole purpose of the assessment was to enable the officers to pay and discharge all existing debts and obligations. The case is not in point.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

THOMAS FYLE v. MINNESOTA BEE SUPPLY COMPANY.[1]

February 2, 1912.

Nos. 17,424—(206).

Failure to guard dangerous machinery — evidence.

In an action for personal injuries, it is *held* that the evidence supports the verdict, and that the trial court properly denied defendant's motion for judgment notwithstanding the same.

Action in the district court for Wright county to recover $3,122 for personal injuries. The case was tried before Hale, J., who, at the close of plaintiff's testimony, denied defendant's motion to dismiss the case, and, at the close of all the evidence, denied defendant's motion to direct a verdict in its favor, and a jury which returned a verdict in favor of plaintiff for $605. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Morton Barrows, for appellant.

Wooley & Johnson, for respondent.

[1] Reported in 134 N. W. 501.

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BROWN, J.

Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from the judgment rendered thereon after the denial of its motion for judgment notwithstanding the verdict. There was no motion for a new trial.

The facts are very short. Defendant was engaged in the manufacture of various supplies required by the bee industries of the state, and in cutting and preparing its material used an ordinary circular saw set in a frame about the height of an ordinary table. The saw is twenty-two inches in diameter; one-half thereof being above the surface of the frame to which it was attached, and the other half in the open space below the same. The saw below the table was not guarded and protected as required by statute. Plaintiff was in defendant's employ as a general laborer about the factory, and had been so employed for about five months prior to the accident here complained of. He had comparatively little experience in working about saws or other machinery. He had worked about this saw for a short time on two previous occasions. In January, 1911, he was required to remove an accumulation of sawdust from under the frame to which the saw was attached, and immediately beneath and about the saw. This was accomplished by the use of an ordinary short-handled shovel. While so engaged, one of his hands came in contact with the saw, resulting in a serious injury.

This action was brought to recover damages for the injury so received, and was predicated upon the grounds: (1) The alleged negligent failure of defendant to guard the saw underneath the frame, although it was practical to do so; (2) the failure of defendant to warn and instruct plaintiff of the dangers incident to the particular work; and (3) that he was negligently furnished a defective shovel with which to remove the sawdust.

The defenses interposed were: (1) A denial of negligence on the part of defendant; and (2) allegations to the effect that plaintiff's injuries were the result of contributory negligence on his part, or occasioned from risks naturally incident to his employment, which he assumed.

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The several questions thus presented were submitted to the jury under clear and fair instructions, and were answered adversely to defendant by the jury. Our examination of the record leads to the conclusion that the evidence sufficiently supports the verdict. If it be conceded that the issue whether it was practical to guard the saw was improperly submitted to the jury, that fact furnishes no basis for judgment notwithstanding the verdict, since the other charges of negligence were sufficient to support the verdict. And, further, if proof of practicability was necessary, the absence thereof amounts only to a defect in the evidence, which might be supplied on another trial, and, within the rule of Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958, is not ground for final judgment.

Judgment affirmed.

PHILIP E. BROWN, being absent on account of illness, took no part.

FOSTER COUNTY STATE BANK v. ALBERT J. LAMMERS and Others.[1]

February 2, 1912.

Nos. 17,451—(199).

Part payment not an accord and satisfaction.

The rule that, where the amount of a debt is undisputed, the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire debt, is not a satisfaction, because the agreement is without consideration, followed and applied.

[1] Reported in 134 N. W. 501.

[Note] Payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole, see notes in 11 L.R.A.(N.S.) 1018; 21 L.R.A.(N.S.) 1005.

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Same — consideration.

It is not a consideration for an agreement to accept a less sum in satisfaction of the whole amount due on a promissory note that the maker agrees after maturity of the note to pay such lesser sum at a place other than that specified in the note.

Same — evidence.

The facts pleaded and offered to be proved by defendants did not bring the case within any of the exceptions to the rule above stated.

Action in the district court for Washington county to recover $449.18, balance alleged to be due upon a promissory note. The case was tried before Stolberg, J., who, at the close of the testimony, directed a verdict in favor of plaintiff for $477.47. From an order denying the motion of the defendants other than T. F. McCue for an order setting aside the verdict and for a new trial, they appealed. Affirmed.

Harold Harris and *H. H. Gillen,* for appellants.

Edwin D. Buffington, for respondent.

BUNN, J.

This action was brought to recover from defendants a balance of $449.18 and interest on a promissory note for $3,000 executed by defendants at Minneapolis, October 8, 1909, payable sixty days after date at Carrington, North Dakota, with interest at seven per cent per annum until paid.

The defendants other than McCue answered, admitting the execution of the note, and setting up the following defense: That on February 18, 1910, defendants Savage and Kinsey paid to plaintiff at St. Paul the sum of $879.70 upon the note, and on June 14, 1910, the other answering defendants, four in number, paid to plaintiff at Stillwater, Minnesota, upon the note, the sum of $1,798.48. That these payments were made pursuant to an agreement made at the time between plaintiff and defendants by the terms of which, in consideration of the promise of plaintiff to release defendants from all further liability on the note, defendants agreed (1) to pay said sums upon said note at St. Paul and Stillwater, Minnesota, instead of at

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Carrington, North Dakota, and to pay the same at the time aforesaid, instead of at some other time; (2) to procure defendant McCarthy, though insolvent, to contribute his proportionate share of the payment, and to furnish him the money therefor; (3) to procure defendant Winston to pay his proportionate share of the note, although he up to that time had refused to pay his proportionate share "on account of a dispute and a counterclaim he had to this demand against him." That plaintiff, in consideration of these promises by defendants, agreed to accept the payments so made in full satisfaction and discharge of all liabilities of the six answering defendants on the note. That said defendants fully performed the agreement on their part. That the payments were accepted by plaintiff in full payment and satisfaction of the note, and that the answering defendants were thereby discharged from any and all liability thereon.

After plaintiff had rested, defendants offered to prove these allegations of the answer. The evidence was objected to, and ruled out by the court, and a verdict directed for plaintiff for the balance of the note remaining unpaid, with interest. A motion for a new trial was denied, and defendants appealed.

1. The trial court, in excluding the evidence offered and in directing a verdict, applied the rule that where the amount of a debt is undisputed the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness, is not a satisfaction, and that such an agreement is not enforceable, because without consideration. It is, of course, clear that each defendant was liable to plaintiff for the full amount of the debt, and therefore that the agreement to release him from liability for the balance due would be an agreement to discharge an undisputed debt by the payment and receipt of a sum less than the whole.

Defendants urge that this rule should be repudiated by this court, and point to many forcible decisions in which the rule has been condemned as absurd, unjust, unreasonable, and false in principle. But there can be no doubt that the great weight of authority sustains the rule, and it is too well established in a long line of decisions of this court to justify us in repudiating it at this late day. Duluth Cham-

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ber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Ness v. Minnesota & Colorado Co. 87 Minn. 413, 92 N. W. 333; Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Demeules v. Jewel Tea Co. 103 Minn. 150, 114 N. W. 733, 14 L.R.A.(N.S.) 954, 123 Am. St. 315; First State Bank v. Schatz, 104 Minn. 425, 116 N. W. 917; Allen v. Batz, 116 Minn. 38, 133 N. W. 79.

2. Defendants contend that a consideration for plaintiff's agreement is found in the fact that defendants agreed to make the payments in Stillwater, Minnesota, instead of Carrington, North Dakota, and that therefore the case falls within a well-established exception to the rule. It is true that an agreement by the debtor, made before the maturity of the note, to pay at a place other than the place specified in the note, or at another time, is deemed a sufficient consideration for an agreement by the creditor to accept a sum less than the whole in full payment. But clearly this consideration is lacking when the note is past due. Before maturity the creditor cannot compel payment at any other time or place than those named in the note, but after maturity he is legally entitled to collect his debt wherever and whenever the debtor is found. The agreement to make the payment at Stillwater was, therefore, no more than defendants were legally bound to do, and was in fact a convenience to defendants, rather than a burden, and a loss to plaintiff, rather than an advantage.

3. The next contention is that the agreement to procure the defendant McCarthy, though insolvent, to contribute his proportionate share of the note, and to furnish him money to make the payment, is a consideration for the alleged agreement of plaintiff. We do not sustain this contention.

Plaintiff was legally entitled to collect the entire note from any one or more of the defendants, and it is not claimed that any of them were insolvent, except McCarthy. Therefore an agreement by the defendants, other than McCarthy, to induce him to pay his share, or to furnish him the money for that purpose, is not an advantage to plaintiff or a disadvantage to defendants. As far as concerns Mc-

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Carthy himself, his insolvency might create an exception to the rule; but there was no offer to prove that McCarthy agreed to pay the less sum in satisfaction of the greater. The defense was pleaded as a defense of all the answering defendants, and the offer made on behalf of all. It was evidently not the intention of counsel by their pleading or the offer to make this defense on behalf of McCarthy, and, as it is clearly unavailable to the other defendants or the defendants jointly, we hold that there was no error in excluding the evidence.

4. The allegation in the answer that defendant Winston had "a dispute and a counterclaim * * * to this demand against him" is a wholly insufficient pleading of a counterclaim or set-off in that defendant's favor. It is also, in our opinion, an insufficient pleading of such a bona fide dispute or counterclaim as would bring the case within the rule that an agreement to accept a sum less than the entire claim in full payment of an unliquidated demand, or one in regard to which there is a bona fide dispute, is valid. Defendant Winston might have pleaded and proved any defense or counterclaim that he had, and he might have pleaded and proved a bona fide dispute or counterclaim in order to show a consideration for the release as to him; but we hold both pleading and offer insufficient to admit evidence of either defense. In no case could this defense avail the other defendants.

5. There is no merit in the claim that the note was canceled. One of the defendants drew pen and ink lines through the signatures of three of the defendants, but the evidence is conclusive that this was done without the knowledge or consent of the payee. Nor is there anything in the point that the payments were made to the Stillwater bank in checks instead of in cash.

We are of the opinion that the trial court correctly excluded the evidence offered and correctly directed a verdict for plaintiff.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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R. W. CLEMENTS v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

February 2, 1912.

Nos. 17,452—(230).

Carriage of live stock — charge to jury.

Action to recover damages occasioned by the alleged negligence of the defendant in unreasonably delaying the transportation of plaintiff's live stock. *Held*, that the trial court erred in instructing the jury as to the claimed negligence of the defendant in the movement of its trains before the plaintiff's stock was received for transportation.

Action in the municipal court of Minneapolis to recover $200 damages for injuries to a shipment of cattle caused by delay in transportation. The case was tried before C. L. Smith, J., and a jury which returned a verdict in favor of plaintiff for $120. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

John L. Erdall, L. K. Eaton and *Alfred H. Bright*, for appellant.

Stiles & Devaney, for respondent.

START, C. J.

This action was brought in the municipal court of the city of Minneapolis to recover damages alleged to have been sustained by the plaintiff by reason of the negligence of the defendant in transporting three carloads of live stock from Cathay, North Dakota, to St. Paul, Minnesota. The complaint alleges several acts of negligence on the part of the defendant in the transportation of the stock, but the sole alleged act of negligence submitted to the jury was whether the stock was transported within a reasonable time after they were received for shipment by the defendant. The jury returned a verdict for the plaintiff for $120. The defendant made a motion for

[1] Reported in 134 N. W. 230.

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judgment in its favor or for a new trial, but on the hearing of the motion it seems to have been treated as one for a new trial only. The defendant appealed from the order denying its motion for a new trial.

The question here to be determined is whether reversible errors were committed by the trial court, entitling the defendant to a new trial.

There was evidence, without substantial contradiction, tending to show that defendant's train in which the plaintiff's stock was carried was one known as a "stock pick-up train," which was run for the benefit of shippers of live stock at the different stations along its line to St. Paul; that three carloads of live stock were taken into the train at Washburn, ten at Garrison, and three at Cathay, North Dakota; that the last three contained the stock of the plaintiff; that when the train reached Glenwood, Minnesota, a division point on defendant's line, the stock in the three cars taken into the train at Washburn had been confined therein thirty-four hours and forty minutes, and the stock in the cars received at Garrison had been confined twenty-eight and one half hours; that the usual run from Glenwood to St. Paul occupies some ten hours, hence in order to comply with the law it was necessary to unload the stock in thirteen of the cars for the purpose of feeding and watering them, and resting them for five hours; that it was not necessary to unload the plaintiff's stock in order to comply with the law, and if the cars containing them had not been delayed at Glenwood for the purpose of unloading the other stock cars, his stock would have reached their destination within the usual time necessary for the transportation of live stock from Cathay to St. Paul, and all loss avoided; and, further, that the delay in forwarding his stock was occasioned by the stopping of the train for the purpose of unloading the stock in the thirteen cars, because it would have been impracticable to have sent forward the cars containing plaintiff's stock by any other train, for there was but one train crew at Glenwood at the time.

Upon this evidence it was a close question of fact whether there was any unreasonable delay in transporting the plaintiff's stock after it was received for shipment. The defendant requested the trial

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court to instruct the jury to the effect that the plaintiff could not recover, unless the preponderance of the evidence showed that the defendant was guilty of some act of negligence alleged in the complaint, which occurred after the plaintiff's stock was accepted for shipment.

The court instructed the jury that the plaintiff could not recover, unless they found that the defendant was guilty in the respect alleged in the complaint. Other than this, the requested instruction was not given, and the jury were instructed as follows: "The plaintiff contends that, prior to the time that his cattle were shipped or received as a shipment, there was unreasonable delay. While they had these cattle, they necessitated their being unloaded at Glenwood, and if the company had handled its train with reasonable care prior to the time that plaintiff loaded his cattle they could have got through to South St. Paul without unloading at Glenwood, and that the delay at Glenwood was caused by the negligence which arose prior to the time that he loaded his cattle. If that negligence had not occurred, there would not any of them have had to be unloaded at Glenwood, and could all have gone continuously through to South St. Paul. If you find that to be a fact, then the defendant was negligent in unloading the cattle at Glenwood, and the plaintiff can take advantage of that negligence. But, aside from that one point, any negligence of the railroad company in the handling of its train prior to the time they accepted the same of the plaintiff cannot be considered by you in deciding whether or not they were negligent in the handling of their train."

The refusal of the requested instruction, and the instruction given, are assigned as error. That the giving of such instruction was reversible error is obvious; for the jury were instructed, in effect, that if they found that there was an unreasonable delay in the movement of the train in question prior to the time plaintiff's stock was received for transportation, and, if such negligence had not occurred, there would not have been any necessity for unloading any of the stock in any of the cars, then the defendant was negligent in unloading the stock at Glenwood, and that the plaintiff could take advantage of that negligence. The jury might well have understood from the instruction that if the defendant unreasonably delayed its train before

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the plaintiff's stock was received, as to which there was no issue, and of which there was slight, if any, evidence, the jury might find therefrom that the defendant unreasonably and negligently delayed the transportation of plaintiff's stock after it was received.

Order reversed, and a new trial granted.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

GEORGE PETERSON v. JOHN H. SKARP and Another.[1]

February 2, 1912.

Nos. 17,453—(231).

Negligence — navigable water.

In this action to recover damages caused to a launch by collision with a stake claimed to have been left by defendants in a navigable channel between the open water of a lake and their dock, it is *held:*

1. That whether defendants were negligent, whether their acts were the proximate cause of the accident, and whether plaintiff was guilty of contributory negligence, were questions for the jury, and the verdict is sustained by the evidence.

2. There was no error in the court's charge or in its refusal to give instructions requested.

3. The court did not err in denying a motion for a new trial made on the ground of newly discovered evidence.

Action in the municipal court of Minneapolis to recover $450.53 damages to a gasolene launch caused by its collision with a submerged post. The answer admitted the use of the launch for the purpose of delivering laundry to persons residing in the vicinity of Lake Minnetonka and alleged that if any injuries were incurred they were caused in whole or in part by the negligence of plaintiff, and that he assumed the risks incident to the collision. The reply was a general

[1] Reported in 134 N. W. 503.

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denial. The case was tried before C. L. Smith, J., who, at the close of the trial, denied defendants' motion for a directed verdict in their favor, and a jury which returned a verdict in favor of plaintiff for $200. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

Harry S. Swensen, for appellants.

Mead & Bryngelson, for respondent.

BUNN, J.

This action was brought to recover damages to a gasolene launch, caused by its striking a submerged post while plaintiff was operating the launch in a passageway leading from a boathouse owned by defendants through the weeds to the open water of Black Bay, Lake Minnetonka. Plaintiff claimed that the passageway was navigable water, and that defendants were negligent in permitting the post to remain therein. Defendants claimed that the lake was not navigable at the place where the post was, that defendants were not negligent, and that plaintiff was guilty of contributory negligence. The trial court denied defendants' request to instruct a verdict in their favor, and submitted the issues to the jury which found a verdict of $200 for plaintiff. Defendants appealed from an order denying their motion for judgment notwithstanding the verdict or for a new trial, and also from an order denying a second motion for a new trial, based on the ground of newly discovered evidence.

The evidence showed that the defendants have residences on the shore of Black Bay, owned a boathouse and dock, and kept and operated a launch. They dredged and deepened the water near the shore for some distance on either side of their dock, and a channel has been made from this dredged place through the mud and weeds to the open water. This channel was about ten feet wide, from four to eight feet deep in the center, and a foot or foot and a half deep on the sides. Defendants used the passageway for their launch, and it was used by other launches in going to and from defendants' dock. Plaintiff used his launch in collecting and delivering laundry about

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the lake, and had on several prior occasions used this channel with his launch in delivering laundry to defendants. On the occasion in question he ran the launch through the channel, delivered some laundry at one of defendants' houses, and in coming back through the channel, when seventy-five or one hundred feet from the shore, the launch struck the submerged post or stake and was damaged. There was evidence that a month prior to the accident men in the employ of defendant were operating a suction dredge within fifty feet of the dock, and that a row of posts or stakes had been driven into the lake bottom seventy-five to one hundred feet from the shore and parallel with it, and the evidence would justify the conclusion that the stake which the launch struck was one of these stakes, which had not been removed after the dredging work was over. As to whether this stake was in the deep water of the channel or in the shallow water on the side was one of the litigated questions.

We have carefully examined the evidence, and hold that it amply supports the verdict of the jury. The channel was used for boats and launches to reach defendants' dock, and was clearly navigable for such purposes. While the testimony was conflicting, the jury was warranted in finding that defendants were negligent in failing to remove the post. This finding is not the result of conjecture. There was a reasonable basis in the evidence for the conclusion that the stake was left in the channel by the defendants. In connection with their claim that the verdict rests on mere speculation or conjecture, defendants insist that the question of the identity of the stake could have been settled had plaintiff produced it in court, and that, not having done so, the presumption arising from the suppression of evidence applies. It is a sufficient answer to this claim to say that it was not shown that plaintiff had the stake in his possession or under his control, or that defendants could not have had it in court had they taken timely measures to that end. In no event can it be said that the absence of this evidence, even applying the presumption, should lead to a reversal.

The contention that plaintiff was guilty of contributory negligence has no merit and needs no discussion. The same may be properly

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said as to the assignments of error relating to the charge, and to the refusal of the court to give instructions requested.

The newly discovered evidence, made the ground for the second motion for a new trial, consisted of affidavits offered to show that plaintiff did not own the launch. These affidavits were mere hearsay, and were fully met by affidavits in opposition. There was clearly no abuse of discretion in denying this motion. Nor does it appear, as defendants claim, that the showing made convicted plaintiff of perjury in his testimony as to the price paid for the boat, or that it has any bearing on the question of value.

The case involved purely questions of fact, the verdict is sustained by the evidence, there were no prejudicial errors, and there is no ground for reversal of the orders appealed from.

Affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

J. M. INGRAHAM v. FRANK BOOTON and Others.[1]

February 2, 1912.

Nos. 17,456—(234).

Search warrant — validity.

In an action to recover damages for the seizure of intoxicating liquors which belonged to plaintiff, brought against a village marshal and citizens commanded by him to assist in the search and seizure, it is *held:*

1. That when a search warrant is fair on its face, is issued by a court which has jurisdiction of the subject-matter, contains nothing to apprise the officer directed to execute it that it was issued without authority, and is not a violation of the Constitution or statute of this state, such a warrant is a full protection to the officer and his deputies who obey its commands.

[1] Reported in 134 N. W. 505.

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2. Such a warrant protects the officer, though it does not contain a technically accurate or sufficient charge of the offense, and though the complaint on which it was issued does not.

3. The warrant under which defendants in this case searched plaintiff's premises and seized intoxicating liquors found thereon was a full protection to defendants.

Action in the district court for Pine county against Frank Booton and fifteen other defendants to recover $5,798.32 damages for the seizure and destruction of a quantity of intoxicating liquors and injury to plaintiff's hotel business. The replies alleged that the complaint and warrant issued thereon did not state facts sufficient to show the commission of a public offense and did not afford any justification to defendants. The case was tried before Stolberg, J., who, when plaintiff rested, granted the motion of certain defendants to dismiss the action as to them, and at the close of the trial directed a verdict in favor of the other defendants. From an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Reed & Swift, for appellant.

Norton & Norton and *S. G. Roberts,* for respondents.

BUNN, J.

This action was to recover the value of certain liquors belonging to plaintiff and alleged to have been converted and destroyed by defendants, and to recover damages to plaintiff's business caused by the acts of defendants. Defendant Booton answered, justifying the seizure of the liquors under a search warrant issued by defendant Madison as justice of the peace. The other defendants made similar answers, except defendants Samuelson, McLain, Madison, and Batty, each of whom interposed a general denial. At the close of plaintiff's case the action was on motion of defendants dismissed as to the defendants last above named, and at the close of all the evidence the court directed a verdict in favor of the remaining defendants. Plaintiff appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

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The assignments of error present the questions whether the trial court was right in dismissing the case as to certain defendants and in directing a verdict in favor of the others. The facts, as they appeared from the evidence, are briefly stated as follows:

Plaintiff on April 12, 1909, and for several years prior thereto, owned and kept a hotel in the village of Sandstone, in this state, and a saloon operated in connection with the hotel. He also kept beer and liquors for sale in a warehouse located across the street from the hotel. At the village election held March 7, 1909, Sandstone voted no license. On April 12, 1909, defendant McLain made a complaint to defendant Madison, a justice of the peace of the village, charging plaintiff with keeping an unlicensed drinking place upon the hotel premises, and also with keeping and maintaining a wholesale house for the sale, delivering, transferring, and disposing of whisky, wine, beer, and other intoxicating liquors to others on the right of way of the Great Northern Railway Company opposite to the hotel. The complaint charged that plaintiff in this "wholesale house" received, kept, sold, and furnished as a beverage to others intoxicating liquors, and contained the allegation "that the keeping and maintaining of said unlicensed drinking place and wholesale house, and said receiving and keeping, and furnishing as a beverage to others of intoxicating liquors therein, is contrary to and in violation of law in this: That said place is unlicensed, and neither of said persons is licensed to keep or sell intoxicating liquor."

On this complaint defendant Madison, as justice of the peace, issued a warrant. This warrant recited the substance of the complaint, described the saloon and the warehouse, commanded the sheriff, or any constable, marshal, or police officer, to arrest plaintiff and bring him before the justice, to be dealt with according to law, and to enter the saloon and the warehouse described in the warrant, search the premises, and seize and hold all intoxicating liquors found thereon. This warrant was delivered to defendant Frank Booton, who was then marshal of said village, but who died before the action was tried. Booton commanded eight citizens of Sandstone, who are defendants

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here, to assist him in executing the search warrant, swearing them in as special deputies. They searched the hotel building and the wholesale warehouse described in the warrant, and seized and took into possession the intoxicating liquors found. Plaintiff was taken before the justice, bound over to the grand jury, and thereafter discharged by the district court; the grand jury returning a "no bill."

When plaintiff rested, there was no evidence tending to show that defendants Madison, McLain, Batty, J. H. Samuelson, and Joel Samuelson, or either of them, had anything to do with the issuance of the warrant or the seizure. The motion to dismiss as to these defendants was therefore rightly granted. Plaintiff claims that the marshal, Booton, and his special deputies, are not protected by the warrant, and therefore were liable for their acts in searching the premises and seizing the liquors.

Plaintiff's argument is based wholly upon the claim that neither the complaint nor recitals in the warrant sufficiently charge defendant with keeping an unlicensed drinking place, or at least with keeping an unlicensed drinking place at the wholesale warehouse. We do not agree with this claim as to the charge relating to the hotel and saloon, and are far from clear that the charge as to the wholesale house is not sufficient; but, even if it be conceded that the warrant does not recite or the complaint charge that plaintiff kept an unlicensed drinking place at the warehouse, it does not follow that the warrant was not a protection to the officer.

If the warrant was fair and legal on its face, if it proceeded from a court or officer having authority of law to issue process of that nature, and contained nothing to apprise the officer that it was issued without jurisdiction or authority, it protected the officer, notwithstanding that the complaint may have failed to state an offense. Jordan v. Henry, 22 Minn. 245; Orr v. Box, 22 Minn. 485; Hines v. Chambers, 29 Minn. 7, 11 N. W. 129. If the process shows on its face that the court was without jurisdiction to issue process of that nature, the officer is not protected; but clearly here the justice had jurisdiction and power to issue a warrant of arrest and a search warrant.

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A sworn complaint had been presented, describing the place to be searched and the property to be seized, and a search warrant was authorized under article 1, § 10, of the Constitution, and section 1553, R. L. 1905. State v. Stoffels, 89 Minn. 205, 94 N. W. 675. The warrant was fair on its face, was issued by a court that had jurisdiction of the subject-matter, and contained nothing to apprise the officer that it was issued without authority. It is not the law that a sheriff, marshal, or other officer whose duty it is to serve process issued by a court is obliged to go behind a warrant fair on its face, and at his peril determine questions of law that courts might differ on concerning the sufficiency of prior proceedings. It is the officer's duty to obey such a process without question. To hold that, before acting, he must take counsel and decide whether the complaint states a case justifying the warrant, would be intolerable. That is the duty of the court that issues the process, not of the officer who executes it.

The statute (section 1553, R. L. 1905) providing for the issuance of a search warrant commanding the officer to search and seize intoxicating liquors found in an unlicensed drinking place does not require that the warrant shall state that the place is an unlicensed drinking place. It should describe the premises to be searched and the property to be seized; but we know of no rule making such a warrant void on its face, if it does not contain a statement of the offense charged in legal and accurate language.

The search warrant is not intended to notify the defendant of the particular offense with which he is charged, as is the warrant of arrest. The defendant does not prepare his defense according to the charge of the search warrant, nor would the language of such warrant have any bearing on the question of defendant's availing himself of an acquittal or conviction in bar of a subsequent prosecution. The search warrant might have been a separate writing, or issued on a separate complaint; but it was legal to include it in the arrest warrant, and to base it upon the same complaint. The warrant was sufficient as a warrant of arrest, and that the grand jury found no indict-

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ment does not affect the question whether the search warrant protected the officer.

We hold that the warrant was fair on its face, issued by a court that had jurisdiction of the subject-matter, and that it fully protected the marshal and the citizens called in by him to assist in the search and seizure. See Gray v. Davis, 27 Conn. 447; Gurney v. Tufts, 37 Me. 130, 58 Am. Dec. 777; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Stewart v. Hawley, 21 Wend. 552; Melcher v. Scruggs, 72 Mo. 406; Mechem, Public Officers, § 632; 35 Cyc. 1744, 1754, and cases cited. We assume, without so deciding, that the liability of these citizens rests on the same basis as the liability of the marshal.

There was no pleading and no evidence sufficient to justify submitting to the jury the question of a conspiracy. Our conclusion is that the trial court rightfully directed a verdict for the defendants.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

ANTON BELSHAN and Another v. ILLINOIS CENTRAL RAILROAD COMPANY.[1]

February 9, 1912.

Nos. 17,337—(186).

Accident at railway crossing — questions for jury.

As plaintiffs were attempting to cross defendant's tracks at a public highway with a threshing outfit, and while delayed on the crossing by the rails

[1] Reported in 134 N. W. 507.

[Note] Defective condition of railroad crossing as affecting traveler's right to recover for injuries sustained in collision with train, see notes in 14 L.R.A. (N.S.) 312; 20 L.R.A.(N.S.) 426.

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extending above the planking, a train ran into the outfit and caused damage thereto. In this action to recover for such damage, it is *held:*

1. Whether defendant was negligent in failing to maintain the rails of its track substantially level with the planking was a question for the jury, and the verdict is sustained by the evidence.

2. Whether plaintiffs were guilty of contributory negligence was a question of fact for the jury, and its decision of such question is sustained by the evidence.

Action in the district court for Freeborn county to recover $2,000, damages to a threshing outfit struck by defendant's train at a highway crossing. The case was tried before Kingsley, J., who, when defendant rested, denied its motion for a directed verdict in its favor, and a jury which returned a verdict in favor of plaintiffs for $650. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Catherwood & Nicholsen, for appellant.

Dunn & Carlson, for respondents.

BUNN, J.

A branch of defendant's railroad crosses the highway at a very acute angle some two miles west of the village of Myrtle, in Freeborn county. The highway is on a section line, and is the main traveled road between Myrtle and Glenville. The approach to the crossing is a moderate slope some forty feet in width, and the planking between and outside of the rails is fifty or sixty feet long. Plaintiffs were the owners of a threshing outfit, consisting of a traction engine, separator, and coal cart. On August 9, 1910, at about 8:30 in the evening, while plaintiffs were attempting to cross the tracks with the outfit, a passenger train of defendant crashed into the separator, demolished that and the cart, and caused some damage to the traction engine. This action was brought to recover the value of the property destroyed and the damages to the engine. The complaint alleges negligence in various particulars, but the only charge that in the opinion of the trial court the evidence tended to support was that the rails were from an inch to two inches higher than the planking. Defendant denied its negligence, and claimed that the accident

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was caused by the negligence of plaintiffs. The trial court denied defendant's motion to direct a verdict, and submitted the issues to the jury. The result was a verdict for plaintiffs. Defendant made the usual motion in the alternative, and appealed from an order denying the same.

The contentions here are: (1) That the evidence fails to disclose any negligence on the part of defendant which will support a verdict for plaintiffs; (2) that plaintiffs were guilty of contributory negligence as a matter of law. In determining these questions we must take the facts as the jury was justified by the evidence in finding them to be. These facts are substantially as follows:

Plaintiffs had finished one job of threshing late in the afternoon, and it was necessary to take their outfit over the crossing to reach the premises of a farmer for whom they were to thresh the next day. About eight o'clock in the evening, the exact time being in dispute, plaintiffs approached the crossing; both riding upon the platform of the engine, which was pulling the separator and coal wagon. When they reached the crossing they stopped the engine and looked for trains. They then knew that the regular passenger train had not passed, and that if on time it was due at the crossing at about 8:30. It was growing dark, and plaintiffs could not see more than a quarter of a mile; but they saw no train, and started to make the crossing. The front wheels of the engine struck the rail on the north side and slid along some thirty feet before getting over; then they struck the south rail and slid twelve feet further; finally the engine got across the tracks, and the separator on them just as the passenger train was seen rapidly approaching. It was then too late to get the separator across. When the headlight of the train was observed, plaintiffs sounded the whistle of the traction engine, and two friends who were present went up the track and tried to flag the train by lighting a match. The train was coming at a speed of forty-five miles an hour, and did not heed the distress signals. Plaintiffs and their witnesses estimate the time during which they were engaged in frantic efforts to get the outfit safely over the crossing at from ten to fifteen minutes. Their testimony tends to show that

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they were somewhat excited, realizing the necessity of haste, but forgetting the imminence of their peril.

1. It is reasonably clear that the accident would not have happened if the rails had been substantially level with the planking, and we think the evidence justified the jury in finding that the crossing was a violation of the statute in this respect. This disposes of the question of defendant's negligence.

2. As far as the negligence of plaintiffs is concerned, the case is very close. We cannot hold that it was negligence to attempt to make the crossing ahead of the train. There was ample time, had they not been delayed on the track, and it cannot be said that they knew or ought to have known that the delay might occur. Neither can we say that plaintiffs could have backed up after discovering their predicament, or that releasing the separator from the engine would have avoided the accident.

The troublesome question is whether plaintiffs, upon discovering that their efforts to cross were taking time, should have taken more effective means than they did to stop the train. No effort was apparently made to that end until after the train was seen, when it was too close to make such efforts availing. It is evident that it would have been necessary for one of plaintiffs or their friends to have started up the track to flag the train long before it was seen or heard. Considering the great speed of the train, the emergency in which plaintiffs were placed through the negligence of defendant, and the fact that their thoughts were naturally directed towards extricating themselves by getting the engine across the tracks, we feel that whether plaintiffs used the degree of care that ordinary men would use under similar circumstances is a question upon which reasonable minds might draw different conclusions, and hence that we have no right to say as a matter of law that plaintiffs were guilty of negligence.

We hold, therefore, that the evidence presented a question of fact

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for the jury, and that we ought not to disturb the jury's decision after the trial court has approved it.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

LAIRD NORTON YARDS v. CITY OF ROCHESTER.[1]

February 9, 1912.

Nos. 17,366—(210).

Invalid contract — part performance — recovery of reasonable value.

Owing to informalities, a contract attempted to be made between plaintiff and defendant, a city under a home rule charter, was invalid. Thereunder coal was delivered by plaintiff to the city electric light plant for three months, and the coal consumed as delivered. *Held* that, the attempted contract being within the power of the defendant to make, plaintiff, upon the pleading and proof, was entitled to recover upon a quantum valebant for the coal received and consumed by the city.

Complaint — evidence.

The complaint having declared on both an express and implied contract, no election being required at the trial, and evidence being received as to the reasonable value without valid objection, the court erred in restricting plaintiff's right to recover to the express contract pleaded.

Municipal corporation — home rule charter.

Provisions in home rule charters of cities may not be construed so as to abrogate well-established equitable doctrines as applied to quasi municipal business transacted by such cities.

Action in the district court for Olmsted county to recover $7,531.14, balance alleged to be due upon the purchase price of a quantity of coal. The substance of the pleadings is stated in the opinion (page 118). The case was tried before Snow, J., who made findings substantially as stated in the opinion and as conclusion of law or-

[1] Reported in 134 N. W. 644.

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dered judgment in favor of defendant. From the judgment entered pursuant to the order, plaintiff appealed. Remanded with direction to the court to amend the conclusions of law so that plaintiff have judgment for the amount demanded.

Brown, Abbott & Somsen and *Callaghan & Granger,* for appellant.

P. J. Scanlon and *Henry O. Christensen,* for respondent.

HOLT, J.

The city of Rochester in 1904 adopted a home rule charter, under chapter 238, p. 349, Laws of 1903. The city is governed by a mayor and common council. It owns and operates a city electric light plant, which is managed and controlled by a public utility board of three members, whose duties are prescribed by the charter. All supplies for the light plant shall be contracted for by the public utility board in the name of the city, but any contract involving the expenditure of more than $200 from the city treasury must first be authorized by the mayor and common council before the public utility board shall have any right to act thereon. When so authorized, the contract must be let to the lowest responsible bidder. The only utility at the present time intrusted to the board is the city electric light plant. Power is given the board to make and enforce necessary rules for the operation and management of the plant, and to fix and maintain the rent rates for light furnished by it, so that the public utility fund of the city shall, so far as possible, in each fiscal year, be sufficient to defray the cost of operation, maintenance, and extension of the plant, and to pay interest on bonds of the city issued on account thereof, and to maintain a reasonable reserve fund for use in making repairs and extensions. All bills against the city on account of the plant shall be verified by the claimant and audited by the board, then transmitted to the city clerk, who shall draw orders upon the city treasury, payable out of the public utility fund, for the amount, and the orders shall be signed by the mayor and attested by the city clerk.

Whenever it is necessary for the council or utility board to procure commodities or services for the city in excess of $200, an officer or

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other person shall be designated to estimate and determine the cost thereof; and, before advertising for bids, detailed plans and specifications for the proposed contract for commodities shall be filed with the clerk. There are found requirements that a certified check of ten per cent of the total bid shall accompany the bid; that bids shall be opened at a designated time and place; if the lowest responsible bid is more than the estimated cost, new bids may be called for; that after acceptance of a bid the contract shall be executed in accordance therewith, and the plans and specifications. Before any contract is made for furnishing "material or commodities" for any purpose, the contractor thereof "shall enter into a bond" for the use and benefit of the city and others. Such bond shall be prepared by the city attorney, approved by the mayor, and filed in office of the city clerk. A further provision (section 287, c. 15), which relates to contracts of the city, or any department or board thereof, reads:

"Any contract made in violation of the provisions of [this] chapter shall be absolutely void, and any money paid on account of such contract by the city, or any department or officer thereof, may be recovered by the city without restitution of the property or the benefit received or obtained by the city thereunder."

On October 10, 1910, the public utility board needed a supply of coal for the plant, and in a meeting of the board then held this motion was carried: "That the secretary be and is instructed to advertise for 6,000 tons of good steam coal, three inches and over, said coal to be delivered in such quantities as may be ordered from time to time during the ensuing year. Bidders must furnish analysis showing the Com. B. T. U. of coal offered, said coal to be delivered in the bin at the city lighting plant according to the city scale weight, or f. o. b. Rochester, Minn." No estimate of the cost of the coal was made, nor specifications filed, as the charter required. Bids were advertised for in substantially the same language; but in the advertisement certified checks to the amount of five per cent, instead of ten per cent, of the bid, as required in the charter, were called for.

Plaintiff tendered two bids—one for 6,000 tons to be furnished between October 24, 1910, and March 31, 1912, of Wilmington big

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chunk at $4.05 per ton delivered at the plant, city scale weight, stating "Analysis of the above coal shows 12,145 B. T. U. per pound of commercial coal" (refers to the steam-making quality of the coal); and one bid to furnish 6,000 tons West Virginia splint coal at $4.50 per ton, the analysis of the coal being 13,500 B. T. U. per pound of commercial coal.

After the bids were opened the utility board adopted the motion: "That coal contract of 6,000 tons of steam coal be awarded Laird Norton Yards, subject to council's approval. Wilmington lump coal at $4.05, and with option of having West Virginia splint stored in yard for use in case of shortage." The same evening the president of the utility board appeared at the regular meeting of the council and reported verbally the bids and the board's action, subject to the council's approval, whereupon the council adopted the resolution: "Be and it is hereby resolved by the common council of the city of Rochester that the public utility board of said city be and it is hereby authorized to enter into a contract for the furnishing to said board 6,000 tons of steam coal for use in the electric light plant." November 2, 1910, the board adopted a motion: "That Laird Norton Yards furnish 600 tons immediate delivery of Virginia splint at $4.50, to be piled in yards to be used in case of car shortage during winter, and 5,400 tons of Wilmington to be delivered from time to time as needed at plant at $4.05 bin."

A contract was thereupon drawn up, whereby plaintiff agreed to sell and deliver to the city at the electric light plant 5,400 tons of Wilmington big chunk and 600 tons of West Virginia splint coal for the price bid. The contract was signed for the city by the mayor and city clerk. The plaintiff erased these words from the contract: "This coal shall show upon analysis 12,145 B. T. U. per pound of commercial coal," and "this coal shall show upon analysis 13,500 B. T. U. per pound of commercial coal," and thereupon signed and returned it to the board. Neither the board nor the council approved the contract, as altered; but it was retained in the files of the board. A bond to secure the performance of the contract was executed by plaintiff December 19, 1910, and delivered to the board, and was retained without objection, but was never approved by the mayor.

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Plaintiff began to deliver coal ostensibly under the contract in November, and continued up to and including January, 1911, delivering in all 1,234⅔ tons of Wilmington big chunk and 622.01 tons of West Virginia splint, and all had been consumed at the plant before this action was begun. No payment was made, except $371.77, paid January 10, 1911. March 22, 1911, the utility board, upon bills presented by plaintiff, ordered $7,531.14 to be paid in three separate sums. These bills were transmitted to the city clerk, who drew orders therefor on the city treasurer, payable to plaintiff, but the mayor refused to sign.

Plaintiff then brought this action, declaring both upon an express and implied contract. The defendant answered by way of denial, and also alleging the invalidity of the contract and that the city had exceeded its authorized indebtedness. A trial was had to the court and findings made.

The court found substantially as above stated, but more in detail, and, further, "that the amount claimed in the complaint is correct and the proper measure of plaintiff's recovery," if any should be had; also that there was more than $8,000 in the utility fund which might have been applied for purchase of coal. But in his conclusion of law judgment was ordered for the defendant, on the ground that the contract was void and that the city was not estopped from asserting its invalidity. The defense that the city had exceeded its authorized indebtedness was not sustained. From a motion denying amendment of the findings and a new trial, plaintiff appeals.

The learned trial court has, in addition to very complete findings, filed an exhaustive memorandum on the two defenses interposed, denying one and sustaining the other. While we do not coincide with the court below as to all matters found against the validity of the contract, we nevertheless conclude that in one particular, at least, there was such failure to execute a binding obligation that the court correctly ruled that no recovery can be had solely on the written contract offered in evidence. We refer to the fact that in the contract as prepared and executed by the city the plaintiff erased a material

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term before signing it. As erased, it was not the contract executed by the city, nor was it in accord with the bid; and mere retention of the contract by the board with the change will not amount to a ratification by the city. Although so technical a construction may not be given to a municipal charter that a strict compliance will in certain instances call for impossibilities or absurdities, still substantial conformity must be exacted in every case.

The formalities prescribed in municipal charters as to letting contracts to the lowest bidder invite fair, open competition, and make for the protection of the taxpayers, and to that end courts are to give full force to the requirements. But a recovery in this action does not necessarily rest on the existence of a valid enforceable contract. It will be noticed that the contract attempted to be made related to a quasi municipal matter. The city owned and operated the electric light plant, not alone for municipal purposes, but also for sale to private parties, and it was designed to be self-sustaining. When a municipality embarks in enterprises outside the purely governmental, it becomes, to a certain extent, amenable to the rules of law that apply to the dealings of individuals and private corporations in like business. Audit Co. of New York v. City of Louisville, 185 Fed. 349, 107 C. C. A. 467.

Moreover, buying coal for the operation of the electric light plant and entering into contracts therefor was not only within the power of the utility board and city council, but became a duty. No doubt all parties attempted in good faith to comply with the charter and enter into a valid agreement; the facts found demonstrate that both plaintiff and the city government understood that this had been done. Plaintiff delivered the coal, the city used it, and for the light manufactured and sold, filled the city light fund, and made a part payment. The utility board has ordered payment. The sum so found due is the value of the coal had and consumed by the defendant. Can the city now be heard to deny liability as to the coal received? The attempted contract is not ultra vires in the primary sense of the term, and for that reason incapable of ratification to any extent, as is held in Borough of Henderson v. County of Sibley, 28 Minn. 515, 11

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N. W. 91; City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737, and Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569. Authorities are not wanting that where the power to make a contract is conferred, but in the attempted making thereof by a municipal corporation irregularities or noncompliance with charter provisions occurred, the contract in so far as performed may be held valid. Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L.R.A.(N.S.) 793, 120 Am. St. 621, and cases there cited; Bradley v. Village of West Duluth, 45 Minn 4, 47 N. W. 166; Moore v. Mayor, 73 N. Y. 238, 29 Am. Rep. 134; Swenson v. Village of Bird Island, 93 Minn. 336, 101 N. W. 495; City of Des Moines v. Welsbach Street Lighting Co. 188 Fed. 906, 110 C. C. A. 540.

We are, however, of the opinion that it is not necessary to determine whether or not the defendant has ratified the attempted contract in so far as plaintiff has performed. The complaint alleged both an express and implied contract. Plaintiff was not required to elect. Testimony was received without valid objection of the value of the coal delivered and used, and the finding made that, if plaintiff was entitled to recover, the amount asked for was correct. This, taken in connection with the facts found, entitles plaintiff to recover for the value of the coal delivered to, accepted, and consumed by the defendant.

We consider that the learned trial court was not warranted in holding that the case presented only the issue of the validity of an express contract. The pleadings, the evidence, and the findings of fact give plaintiff the clear legal right to recover upon quantum valebant, and the justice of the claim is so patent that no labored effort ought to be made to confine plaintiff's rights to the basis of a doubtful express contract, or to ratification as far as the attempted contract was performed. The language of Justice Mitchell in State v. McCardy, 62 Minn. 509, 64 N. W. 1133, is apt here: "In so far as the contract has been thus executed, it stands precisely as if it had been one to furnish light [coal] at the pleasure of the committee [city]." 2 Dillon, Municipal Corp. (5th Ed.) 793, 794. See City v. East St. Louis, 98 Ill. 415, 38 Am. Rep. 97.

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Much stress is laid on section 287 of the charter above quoted. Any city may frame a charter; but it must be in harmony with and subject to the Constitution and laws of the state. We conceive this to mean, not only the statute law, but the common law found in the decision of courts as well. It cannot be that under the provisions of home charters municipal corporations may abrogate the common-law rule of estoppel, or other settled equitable doctrines, in the conduct of the quasi municipal enterprises into which they may embark. The section mentioned, in so far as it gives the municipality the right to recover money paid on a void contract, while permitted to retain the benefits received thereunder, must be confined to contracts ultra vires in the primary sense. And as to contracts which the city or the utility board have power to make, but in the attempted making unintentional irregularities and noncompliance with charter provisions have occurred, this section prevents a recovery thereon, or the enforcement thereof in court, and gives any taxpayer the right to enjoin its performance. It cannot, as to last-mentioned attempted contracts, abrogate established equitable doctrines, which in certain cases permit a recovery of the reasonable value of goods delivered in good faith thereunder to the municipality, and by it used for authorized and legitimate purposes.

The case cited by the court which appears to deny a right to recover on an implied contract is Leland v. School District, 77 Minn. 469, 80 N. W. 354; but it is to be observed that to no extent is a school district liable to a teacher for services unless there be a written contract, while the city, through its utility board, may lawfully buy coal every day without a written contract, provided it does not exceed $200 for each transaction. The case of Chippewa v. City of Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. 931, also cited, was brought by a taxpayer to enjoin proceedings under a contract irregularly entered into, and after suit brought the parties went on with the work; the municipality paying money which the court held could be recovered.

The case is remanded, with direction to the court to amend the

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conclusions of law, so that plaintiff have judgment for the amount demanded in the complaint.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

H. ARCHER v. JOHN A. WHITTEN.[1]

February 9, 1912.

Nos. 17,385—(215).

Account stated — evidence.

In this action to recover on an account stated, it is *held* that the evidence supports the verdict in favor of plaintiff, and that there was no error in the rulings on the trial.

Action in the district court for Hennepin county to recover $1,470.50 upon an account stated. The answer interposed a counterclaim for $1,948.72. The reply was a general denial. The case was tried before Holt, J., and a jury which returned a verdict in favor of plaintiff for $1,552.89. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Albert H. Hall, for appellant.

L. A. Hubachek and *William A. Tautges,* for respondent.

BUNN, J.

Action to recover $1,470.50 and interest on an account stated. Defendant denied that an account was stated, and pleaded various defenses and counterclaims, all arising out of the matters between the parties that plaintiff claimed were settled and adjusted by the account stated. The only question submitted to the jury was whether

[1] Reported in 134 N. W. 508.

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the parties adjusted their accounts and differences, and agreed upon the balance struck as the true sum due from defendant. The verdict was in favor of plaintiff, defendant's motion in the alternative was denied, and he appealed.

The only substantial question here is whether there is evidence reasonably tending to support the decision of the jury that an account was stated. During the course of the performance by plaintiff of a contract with defendant for remodeling a building, disputes arose. Defendant claimed that plaintiff had failed to do the work according to the specifications in different particulars, and claimed various credits. Plaintiff testified that these disputes were adjusted at a meeting between the parties, that the credits to be allowed defendant were agreed to, and a balance struck, and that defendant assented to this balance, and agreed to pay it. Defendant admitted the adjustment of certain of the disputes, but denied any agreement covering the entire matter, and denied an assent to or agreement to pay the balance shown by the account. The question was submitted to the jury under clear and accurate instructions, and the decision was in favor of plaintiff's contention.

We have examined the record, and conclude that the evidence presented a clean-cut question of fact, and that the verdict cannot be disturbed under the rules governing the action of this court in such cases. If the jury believed plaintiff, then an account was stated, and we are in no way justified in saying that plaintiff's evidence was unworthy of belief, or that the evidence to the contrary was so convincing that it was an abuse of discretion to refuse a new trial.

Defendant claims surprise at the attitude of plaintiff's attorney on the trial in proceeding upon the theory of an account stated, and refusing to join issue upon the performance or breach of the original contract. There is clearly nothing in this contention.

There was no error in declining to give the instructions requested by defendant. As far as they were correct statements of the law and applicable to the case, they were fully covered in the charge.

We are asked to remand this case, with permission to defendant to move the trial court for a new trial on the ground of new evidence

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discovered since the appeal was taken. The whole matter of leave to make such motion, as well as its decision, rests with the trial court.

Affirmed.

HOLT, J., having tried the case below, took no part.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

M. REINHARD SCHUMACHER v. GREENE CANANEA COPPER COMPANY and Others.[1]

February 9, 1912.

Nos. 17,396—(216).

Pledge of stock certificate.

When a stock certificate is pledged with a bank, the act of an officer thereof in wrongfully appropriating the same for his own purposes is not the misappropriation of the bank to whose custody it was intrusted, even though the bank may be liable to the pledgor.

Same — right of owner against purchaser for value.

The owner of a stock certificate indorsed in blank, who in pledging the same to a reputable going bank is free from negligence, is not estopped from asserting title thereto as against an innocent good-faith purchaser for value, who derives title through one who stole such certificate from the bank while it was pledged, even though the thief be the cashier of the bank.

Custom of brokers.

A custom prevailing among brokers and bankers to pass stock certificates indorsed in blank from hand to hand without inquiry as to source of title, the same as negotiable paper, does not override the established law that stock certificates have not all the attributes of negotiable instruments; nor does such custom warrant the court in changing the law to conform to the custom.

[1] Reported in 134 N. W. 510.

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Action in the district court for St. Louis county against Greene Cananea Copper Company, the City Trust Company, the individual partners constituting the firm of Hamlin, Nickerson & Company, J. Thomas Reinhardt and Philip Tillinghast, as receiver of the First National Bank of Ironwood, Michigan, to determine that plaintiff was the sole owner of certain shares of stock in defendant mining company and of a certain certificate of stock, and to enjoin defendants Hamlin, Nickerson & Company and defendant Reinhardt from asserting any claim thereto.

The answer of Greene Cananea Copper Company and City Trust Company admitted that on or about July 10, 1909, plaintiff notified defendant copper company that he was the sole owner of the certificate of stock and of the alleged theft thereof, and demanded that the copper company refuse to transfer said certificate; alleged that on October 21, 1909, the certificate had been presented to these defendants for transfer by defendants Hamlin, Nickerson & Company and that thereupon, by reason of the notice theretofore received from plaintiff, defendant copper company refused to make the transfer; that defendants Hamlin, Nickerson & Company and Reinhardt claimed and still claim that they own the stock and certificate evidencing the same; admitted that the certificate had been in their possession and control ever since October 21, 1909; alleged that they were unable to determine which of the parties were the rightful owners of the stock, but that defendant copper company always had been and was willing to have the certificate of stock transferred to such person of the adverse claimants as the court should determine was the rightful owner. The answer of the partners constituting the firm of Hamlin, Nickerson & Company alleged that in making the purchase of the stock they acted in the utmost good faith in the belief they were dealing with the full equitable and legal owner, and they never dealt with the Larson referred to in the complaint.

The reply admitted the certificate was presented to the City Trust Company for transfer; that it took the certificate, but refused to issue a new certificate or to return the old certificate.

The case was tried before Dibell, J., who made findings and as

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conclusions of law found that plaintiff was the owner of the one hundred shares of stock of defendant Greene Cananea Copper Company evidenced by stock certificate numbered A 4708, and that none of the defendants had any interest therein; that defendant Greene Cananea Copper Company deliver the certificate of stock to plaintiff and transfer the same on its books, in such manner as he may direct. From an order denying their motion to amend the findings of fact and conclusions of law or for a new trial, defendants B. Nason Hamlin, William G. Nickerson and Alfred Codman appealed. Affirmed.

Wilson G. Crosby and *Oliver S. Andresen,* for appellants.

Haroldson & Colton and *Herb M. Norris,* for respondent.

HOLT, J.

This action was brought to determine the ownership of shares of stock in the defendant Greene Cananea Copper Company, a corporation of this state. The defendants Hamlin, Nickerson & Company claimed the share certificate evidencing the stock, and denied plaintiff's right thereto. The trial resulted in findings of fact and conclusions of law in favor of plaintiff. Hamlin, Nickerson & Company moved the court for amended findings, and, in case of a denial of such motion, for a new trial. An order denying both motions was made. From the order this appeal was taken.

The facts in the main are these: On May 12, 1909, plaintiff held and owned a share certificate in the Greene Cananea Copper Company, issued in his name and bearing the number A4708. He then borrowed from the First National Bank of Ironwood, Michigan, $700, giving his promissory note, due in four months, to the bank, and as security pledging the certificate in suit and two similar certificates in other corporations. When so pledged, the certificates were indorsed in blank by plaintiff and attached to the note. The note described the certificates pledged, and authorized the president or cashier of the bank, in case of default, to sell and apply the proceeds to the payment of the note. Elvin T. Larson was then cashier of the bank and managed its business, assisted by the other officers thereof.

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May 17, 1909, Larson took the note and certificates from the bank, detached the certificate in question, and gave it, together with many other stock certificates, to a broker to sell. This certificate and others were sold by the broker to Miller & Company, of New York. The broker drew a draft for the price on that firm, payable to his own order, indorsed and delivered the draft to Larson, who thereto attached the certificates sold, and forwarded the same to a Duluth bank for collection, with instruction to credit the amount to the First National Bank of Ironwood. The stock certificates thus turned over to the broker by Larson, and sold, realized $20,081.74. June 21, 1909, the First National Bank of Ironwood was placed in the hands of a receiver.

Plaintiff did not discover that the pledged certificates had passed out of the possession of the pledgee till July 1, 1909, and on the ninth day of that month he notified the Greene Cananea Copper Company and its transfer agent in New York City of the loss. Thereafter plaintiff tendered payment of the note to the receiver of the bank at the proper time and demanded the return of the certificates pledged; but the receiver had neither note nor certificates under his control. The defendants Hamlin, Nickerson & Company, without notice of plaintiff's rights, bought in open market the certificate involved in this suit, in good faith, and at full market price.

The court also found that the cashier, Larson, stole this certificate from the bank, and that plaintiff's act in pledging it with the bank, indorsed in blank, was not negligence, nor was he negligent after discovering its loss. And the court refused to find, as requested by appellants, that the disposal of the certificate was the unauthorized act of the bank itself, or that plaintiff was estopped from asserting title to the certificate.

If the sale of this certificate of stock was the act of the bank, the appellants should prevail; for the weight of authority is that where, by a wrongful or unauthorized act, two innocent persons have been placed in a situation where a loss must be borne by one of them, it falls on the one who first trusted the wrongdoer and put in his hands the means of inflicting the loss. Scollans v. Rollins, 179 Mass. 346,

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60 N. E. 983, 88 Am. St. 386; East Birmingham v. Dennis, 85 Ala. 565, 5 South. 317, 2 L.R.A. 836, 7 Am. St. 73. But the court found that the act of abstracting and selling the certificate was not the act of the pledgee bank, but of one of its officers, for a purpose personal to him. In our opinion this finding is abundantly supported.

Larson, prior to May 17, 1909, was a defaulter. He had depleted the funds of the bank by stealing or embezzling large amounts. In an attempt to hide or cover these defalcations, during an expected visit of the bank examiner, these stock certificates were purloined and disposed of by Larson, and the proceeds turned into the bank's funds. The note of plaintiff was not in the bank, but was found at the office of another concern managed by Larson. The broker did not have the transaction in regard to the sale of the certificates at the bank, and did not understand that he acted for the bank. The circumstance that Larson had previously stolen large amounts from the bank, and by the theft of this certificate and a large number of others obtained funds which he caused to be turned over to the bank to cover up the prior thefts, does not change the nature of his last offense. Plaintiff dealt with the bank, not with Larson. He intrusted the certificate to the possession of the bank. He authorized no one but the bank to sell or deliver it on any condition. There is no evidence that the bank would have been in need of funds, but for Larson's thefts and defalcation.

The chief contention of appellants is that plaintiff, by pledging the certificate, indorsed in blank, and by the authority given in the note to the cashier to sell in case of default, is now estopped from asserting title as against an innocent good-faith purchaser for value. The only act of plaintiff upon which appellants may claim that they relied in making the purchase is the blank indorsement of the certificate. But the law is that the blank indorsement on a share certificate of stock does not, in itself, estop an owner from claiming it, in a case where it has been stolen from him and has passed into the hands of an innocent holder for value. A certificate representing shares of stock is not negotiable paper in the sense that the title transferred

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by a thief to an innocent good-faith holder cannot be questioned. This is conceded to be the law in the cases relied on by appellant. Shattuck v. American, 205 Pa. St. 197, 54 Atl. 785, 97 Am. St. 735; Beckwith v. Galice, 50 Ore. 542, 93 Pac. 453, 16 L.R.A.(N.S.) 723. See also Barstow v. Savage, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L.R.A. 498, 60 Am. St. 411; Knox v. Eden Musée, 148 N. Y. 441, 42 N. E. 988, 31 L.R.A. 779, 51 Am. St. 700.

In the present case it is found that, in pledging the certificate indorsed in blank with the bank, plaintiff was not negligent; hence no estoppel on that ground. The finding cannot well be challenged. The bank was a national bank in good standing. Pledging stock certificates as security for loans at banks is so common and extensive in the business world that no one questions the care and prudence of the one who thus trusts the possession of his property to a going bank. In order to make such a pledge available, it is customary, and perhaps necessary, to have certificates indorsed. But it is claimed that by pledging the certificate plaintiff intrusted its possession to the officers of the bank, because the bank could exercise control over the property only through its officers or servants. Therefore, having placed the certificate in the bank, where, of course, its cashier had access to it, the contention is plaintiff trusted to his honesty, and, the cashier having abused this confidence, plaintiff, and not appellants, must bear the loss.

We are cited to no case which holds that, where property of this kind has been intrusted to a corporation for safe keeping, theft thereof by any of its officers or servants will estop the owner from asserting title thereto as against the title derived through the thief by an innocent good-faith purchaser for value. We have already adverted to the fact that plaintiff dealt with and trusted the bank—not any of its officers. And it would seem a reasonable view that, unless the disposition of such property be the act of the corporation, the officer or agent concerned in such disposition may be regarded as an intermeddler and outsider.

We do not consider that the legal principles announced in the

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cases relied on by appellants, as applied to the facts therein, require a holding that plaintiff is estopped in the case at bar from claiming the certificate.

O'Neil v. Wolcott Mining Co., 174 Fed. 527, 98 C. C. A. 309, 27 L.R.A.(N.S.) 200, was a case where a corporation refused to transfer stock upon the claim of Wolcott that thirteen years before he had lost it. The evidence did not tend to show that the certificates of shares plaintiff had bought were the ones Wolcott lost, or that he had lost any.

In Beckwith v. Galice, supra, Beckwith was induced by the deception of one Levy to intrust the possession of stock certificates to a fictitious bank organzied by Levy and others for fraudulent purposes, and the decision was placed on the ground that Beckwith intended to give the so-called bank power to dispose of the certificates; hence possession of the certificates was obtained by fraud, and not by common-law theft, and Beckwith was estopped.

In Shattuck v. American, Shattuck left the certificates of stock in the safe of his clients, a partnership of stockbrokers. One of the partners abstracted and pledged the certificates, and it was held Shattuck was estopped, because, "where one, by his own act, arms another with power to act for him, he who so armed the wrongdoer must suffer for the consequences of the wrongdoing."

We may add to the authorities already cited, which all appear to sustain plaintiff's position, Hall v. Wagner, 111 App. Div. 70, 97 N. Y. Supp. 570, and Farmers v. Diebold, 66 Oh. St. 367, 64 N. E. 518, 58 L.R.A. 620, 90 Am. St. 586.

We are also invited to hold, in effect, that share certificates of stock are negotiable instruments, and hence an innocent good-faith purchaser for value takes title as against the true owner, who has been deprived of possession by theft, because it is claimed that there was proven a custom among banks and brokers for certificates of stock with the transfer on the back indorsed in blank to pass from hand to hand without inquiry, the same as negotiable paper. A custom which runs counter to the settled and established law is not to be adopted by the courts. If a crying demand exists in the business

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world to have certificates of shares in corporations placed on a parity with negotiable paper in every respect, it is a proper matter for legislative investigation and action.

We are of the opinion that the trial court made proper findings, and that there was no error in refusing the motion for amended findings, or in denying a new trial.

The order is affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

KATE ENGLISH v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

February 9, 1912.

Nos. 17,406—(207).

Railway station — defective steps — liability of defendant.

The tracks of defendant and another railway company cross in the city of Waseca at right angles, and in the angle thus formed is a passenger station used jointly by the two companies. A platform extends around the station and along the tracks of both companies. From the platform along defendant's tracks steps lead to a street crossing. Plaintiff, in returning from a visit to the station to inquire as to the time of trains and connections, was injured by the steps breaking as she attempted to walk down them. For many years these steps and defendant's platform had been used by the people of Waseca to reach the station, whether their business was with defendant or with the other company. It is *held* that, whether plaintiff's purpose in visiting the station was to get information as to defendant's trains or as to the trains of the other company, defendant owed her the duty to use reasonable care to maintain the steps in a reasonably safe condition.

[1] Reported in 134 N. W. 518.

[Note] Degree of care toward passengers at stations generally, see note in 33 L.R.A.(N.S.) 855.

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Action in the district court for Waseca county to recover $5,000 for personal injuries. The answer alleged plaintiff's contributory negligence. The reply was a general denial. The case was tried before Childress, J., and a jury which returned a verdict in favor of plaintiff for $1,500. From an order denying defendant's motion for judgment in its favor notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. H. Bremner, P. McGovern and *Geo. W. Seevers,* for appellant.

Moonan & Moonan, for respondent.

BUNN, J.

In the city of Waseca the tracks of defendant and of the Chicago & Northwestern Railway Company cross at practically right angles. A passenger station is located in the angle formed by the junction of the two roads and used by both companies jointly. Defendant's tracks run north and south. A plank platform extends around the station and along defendant's tracks to the north some three hundred feet across Oak street and past defendant's freight depot. The platform also extends easterly along the tracks of the Northwestern Company past a baggage room to a cinder walk which leads north to Oak street. At the point where defendant's tracks cross Oak street two steps lead down from the platform to the street crossing plank near the north line of the street, which was not opened across defendant's right of way. Plaintiff lives on the north side of Oak street about sixty feet east of the platform.

About six o'clock in the evening of December 16, 1910, plaintiff went to the passenger station to inquire about trains. The ticket office was closed, and she walked back north on the platform and attempted to go down the steps leading to the crossing on Oak street. As she stepped on the second step, it broke and gave way. Plaintiff was thrown down, striking her head and back against the platform, and was injured. This action was brought to recover damages for the injuries so received. The trial resulted in a verdict for plaintiff. Defendant moved in the alternative for judgment notwithstanding

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the verdict or for a new trial, and appealed from an order denying such motion.

1. The assignments of error, as stated in defendant's brief, may all be summed up in one claim: That under the facts in this case the defendant was not guilty of any negligence, for the reason that it owed no duty to the plaintiff with respect to the condition of the steps in question. Defendant concedes that the evidence was sufficient to make a case of liability, if it owed any duty to the plaintiff; but its contention is that plaintiff was upon the platform upon business not connected with defendant, that she was a trespasser, or at most a bare licensee, and hence that defendant owed her no duty, save not to wilfully or wantonly injure her. In other words, the claim is that plaintiff came upon the premises on business with the Northwestern Company, and that the defendant owed no duty to keep its platform or the steps safe for people who did not use them for purposes connected with defendant's business.

We will consider the question on the assumption that the evidence conclusively shows that plaintiff's purpose was wholly to inquire as to the time of departure of the Northwestern trains, and the connections made by such trains with the Great Northern at Minneapolis. This is an assumption which the evidence does not make necessary, but we prefer to meet the question raised by defendant.

Defendant uses the passenger station jointly with the Northwestern Company under an agreement between the two companies. Under this agreement the land on which the station platform of defendant was situated was leased to defendant, and admittedly it was defendant's duty to use reasonable care to keep the platform and steps leading thereto safe. The evidence showed that each company had its own station agent, who came to the station shortly before the arrival of a train upon his road. For thirty years practically all people who had business with either road and lived west of the defendant's tracks reached the station by using the defendant's platform, and from fifty to seventy-five per cent of those living in the eastern, northern, and central parts of the city, who had business with either road, used the steps at Oak street and the platform of

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defendant. The way by First street, the cinder path, and the Northwestern platform was inconvenient to those residing north of the station, especially in wet weather, when the path became muddy. No objection was ever made by defendant to this use of its platform and steps by people who came to take the Northwestern trains, to meet passengers on such trains, or to do business with that company.

On these facts we cannot sustain defendant's narrow theory of the measure of its duty to those using the platform and steps for purposes of business connected with the Northwestern Company. We must hold that there was an implied invitation to the public to use defendant's platform and steps for such purposes. There can be no doubt that, where there is an express or implied invitation to use the premises of the owner, there is the duty to use reasonable care to see that persons thus invited shall not be injured.

We have in this case an invitation implied from long years of acquiescence in the use made by the people of Waseca of defendant's platform and steps, as well as from the situation itself. We have also the failure to use reasonable care to maintain the premises in a safe condition. We hold that defendant owed this duty to use reasonable care to all who used its premises on business either with defendant or with the Northwestern Company. There can be no doubt that defendant would not owe this duty to a mere trespasser, who was on its premises without its invitation; but that is not this case.

Nor do we deem it important that it would have been difficult, if not impossible, to have limited the use of its platform and the steps to people whose business was with defendant. It is not to be supposed that defendant would wish to so limit their use, or could legally do so. While the depot was not strictly a union station, it was used by both companies jointly. The platform extended along the tracks of both companies and around the station, and was continuous. There was no dividing line. To hold as defendant contends would be to adopt a view that is opposed to common sense and to sound legal principles. As we have held in several cases, it is not important by what name we designate the relation between the owner of premises and

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one who is invited to use them. Even calling the latter a licensee, the duty to use reasonable care exists, and the case here is much stronger than where the implied invitation is to use the premises for the mere personal convenience or pleasure of the licensee.

Our decisions in Lauritsen v. American Bridge Co. 87 Minn. 518, 92 N. W. 475, Ellington v. Great Northern Ry. Co. 96 Minn. 176, 104 N. W. 827, and Erdner v. Chicago & N. W. Ry. Co. 115 Minn. 392, 132 N. W. 339, are decidedly in point, and go further than it is necessary to go in this case. In truth, it would be the limit of refinement to attempt to distinguish between the rights on the platform of those who had business with defendant and those whose purpose was to reach the trains or consult the agent of the Northwestern Company.

The case of Louisville v. Treadway, 142 Ind. 475, 40 N. E. 807, clearly distinguishable. There the negligence was the failure to light the platform, and it was held that, as the Clover Leaf Company had no trains running at night either to or from the station, it was under no duty to light the platform. The question of invitation was not in the case, nor was there any defect in the platform that caused the accident.

In Cincinnati v. Aller, 64 Oh. St. 183, 60 N. E. 205, plaintiff was not using the platform on business connected with either company.

We hold that defendant owed plaintiff the duty to use reasonable care to maintain its platform and steps in a safe condition, and that the evidence was clearly sufficient to justify a finding that it had failed in this duty.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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JOSEPH UNDERLEAK v. ZOLA MAY SCOTT and Others.[1]

February 9, 1912.

Nos. 17,408—(221).

Bankruptcy — avoidance of conveyance by trustee.

Under section 67e of the bankruptcy act of July 1, 1898, a trustee in bankruptcy cannot avoid a conveyance executed and delivered by the bankrupt more than four months prior to the filing of the petition, though such conveyance is filed for record within the four months period.

Same.

Under section 70e of the bankruptcy law the trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided under the common law or the statutes of the state, whether such transfer is made within four months prior to the filing of the petition or not.

Avoidance of transfer by creditor — intent of debtor.

Under the laws of this state, a creditor may avoid a transfer made with intent to hinder, delay, or defraud creditors. Such intent of the debtor is essential to the fraudulent character of the transfer. A voluntary conveyance is presumptively fraudulent as to existing creditors, but not conclusively so. Where the debtor is solvent, and retains sufficient property to amply satisfy the claims of existing creditors, in the absence of an actual intent to hinder, delay, or defraud creditors, such a transfer is valid.

Insolvency of debtor — exempt property.

The definition of what constitutes "insolvency," contained in section 1, subd. 15, of the bankruptcy act does not control in determining whether a debtor was insolvent, so as to make a voluntary conveyance fraudulent

[1]Reported in 134 N. W. 731.

[Note] When local law deemed to require the registering or recording of a transfer, within the meaning of § 60a of the bankruptcy act of 1898 as amended by the act of 1903, see notes in 5 L.R.A.(N.S.) 148; 18 L.R.A.(N.S.) 1233.

Voidability of transfer within four months' period, pursuant to executory agreement antedating that period, see note in 17 L.R.A.(N.S.) 935.

Right of creditor of bankrupt to set aside transfer in fraud of creditors, see note in 10 L.R.A.(N.S.) 305.

Intent on part of bankrupt to create a preference as a condition of a voidable preference under § 60b, see note in 33 L.R.A.(N.S.) 558.

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under the laws of this state. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims.

Conclusion sustained by findings of fact.

The findings of the trial court that the debtor had no intent to hinder, delay, or defraud his creditors, that he was solvent, and retained property exempt from execution of a reasonable value in excess of his debts, sustain the conclusion of law that the transfer was not void.

Action in the district court for Olmsted county by the trustee in bankruptcy of David W. Scott, bankrupt, to set aside a certain deed and subject the land described to payment of the bankrupt's debts. The case was tried before Snow, J., who made findings and as conclusion of law found that defendants were entitled to a dismissal of the action on the merits. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

E. W. Rossman and *Burt W. Eaton,* for appellant.

M. D. Halloran and *Thomas Fraser,* for respondents.

BUNN, J.

February 14, 1910, defendant David W. Scott filed a petition in bankruptcy and was duly adjudged a bankrupt. Plaintiff was appointed trustee in bankruptcy, and brought this action to set aside a deed to eighty acres of land made by Scott to his daughter, defendant Zola May Scott. The complaint alleged that the deed was filed for record by David W. Scott December 4, 1909; that he was then insolvent, and had been at all times during the year 1909; that the deed was without consideration, and given with intent to delay, hinder, and defraud his creditors, with an agreement by the daughter to hold the title in trust for the grantor. The answers of defendants alleged that the deed was made and delivered March 25, 1909, and denied that Scott was insolvent, or that the deed was given with intent to defraud creditors. The issues were tried by the court, and

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a decision made in defendants' favor. Judgment was entered on the decision, and plaintiff appealed.

As there is no settled case or bill of exceptions, the question of the sufficiency of the evidence to sustain the findings is not before us. It is contended by plaintiff that the conclusions of law are not sustained by the findings of fact, and that on these findings the court should have ordered judgment setting aside the deed. The facts found by the trial court are substantially as follows:

David W. Scott and Josephine Scott are husband and wife, and Zola May Scott is their daughter and only child. They have lived in Fillmore county, Minnesota, for more than ten years. On and for some years prior to March 25, 1909, David W. Scott owned the eighty-acre tract in question, and on that day he and his wife duly signed in the presence of two witnesses a warranty deed of said land running to the daughter, and on the first or second day thereafter "duly, actually, and permanently" delivered said deed to her. The deed was recorded December 4, 1909. The grantee therein assumed a mortgage for $2,500 on the land. There was no actual intent or purpose on the part of the grantors or grantee to hinder, delay, or defraud any creditor of David W. Scott by the execution and delivery of the deed. There was, however, no consideration for said deed, other than the love and affection of the grantors for the daughter.

At the time the deed was delivered David W. Scott was indebted in the aggregate amount of $2,492.04 unsecured, and in the sum of $2,593.75 to the First National Bank of Chatfield, amply secured by a mortgage on the land conveyed by said deed. Of the unsecured indebtedness existing at the date of the deed, $748.83 was paid by Scott before the day the deed was recorded. In the meantime he had incurred new and unsecured debts to the amount of $1,400. When the deed was delivered, Scott had property not exempt from execution, exclusive of the conveyed land, of the reasonable value of $2,500, and property exempt from execution of the reasonable value of $3,000, and "as a conclusion of mixed law and fact the court finds that said David W. Scott was not then insolvent."

After the delivery of the deed, and before it was recorded, the land

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was in the possession of a tenant, to whom it had been leased before the deed was given. Scott attended to the management of the land, and a considerable portion of the proceeds was used to defray the daughter's expenses while attending school away from home. What was done with the rest of the proceeds did not appear from the evidence. During this period Scott represented to two different commercial agencies that he was the owner of the land, and some of the persons to whom he became indebted during this interval extended credit to him in reliance in part on these statements; but the daughter neither authorized, consented to, nor knew of these representations, was entirely ignorant of her father's financial condition, and neither in omitting to record the deed nor in suffering her father to manage the land did she have any intent to defraud, delay, hinder, or mislead any person, or to give her father a fictitious appearance of financial worth or responsibility. The plaintiff, as trustee, has converted into money all the unexempt property of the bankrupt, and the proceeds will suffice to pay but a small percentage, if any at all, of the amount of claims allowed against the bankrupt's estate.

1. Under section 67e of the bankruptcy act, all conveyances made or given by a bankrupt within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, are null and void as against his creditors, and the trustee may recover the property conveyed for the benefit of the creditors. Plaintiff contends that the conveyance was "made or given" at the time it was filed for record, and therefore, as it was without consideration, and the grantor was insolvent at this time, it was fraudulent as against creditors of the grantor, even in the absence of an intent to hinder, delay, or defraud creditors.

We may concede, and it is probably correct, that if the conveyance was made or given within four months prior to the filing of the petition the conclusion would follow that it could be set aside in this action. But the difficulty is in holding that a conveyance is not made or given when it is executed and delivered. A conveyance is valid, without being recorded, save as to subsequent purchasers in good faith and as to attachments and judgments prior to the recording of

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the conveyance. R. L. 1905, § 3357. In the commonly accepted meaning of the words, a deed is "made" or "given" when it is delivered. The title passes then. Record is necessary to protect the grantee, but is no part of the making or giving of the instrument. We cannot distort the plain meaning of the words used. It would have been very easy to have provided that the date of recording should be deemed the date when the conveyance was made; but without such a provision we must hold that under section 67e of the bankruptcy act a conveyance is made or given when it is delivered, and therefore that the four months limitation prevents recovery by the trustee under this section.

The cases under section 60a of the bankruptcy act of 1898 as amended by the act of 1903 are clearly not in point. That section relates wholly to preferences, and the amendment expressly provided that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." It is clear that this provision has no application to fraudulent transfers that are not preferences, and that the transfer sought to be set aside in this case was not a preference. It is therefore unnecessary to discuss section 60a as amended, but reference may be made to the following cases interpreting its meaning: Seager v. Lamm, 95 Minn. 325, 104 N. W. 1; First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L.R.A.(N.S.) 148; Loeser v. Savings Deposit Bank & Trust Co. 148 Fed. 975, 78 C. C. A. 597, 18 L.R.A.(N.S.) 1233, and note.

2. Section 70e of the bankruptcy act of 1898 provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided." Under this provision it is not necessary that the transfer be made within four months prior to the filing of the petition. It includes fraudulent conveyances which are so by common law, by statute law, and by any other recognized rule of law other than the special provisions of the bankrupt statute. To give the trustee the title to property transferred by the bankrupt, and a right to recover such property, the

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conveyance must be fraudulent as to creditors under the common law or statute law. There must be fraud in fact, as distinguished from the constructive fraud that is sufficient where it is so provided in the bankruptcy act. Loveland, Bankruptcy (3d ed.) § 158; 1 Remington, Bankruptcy, §§ 1216, 1217.

3. The inquiry then is: Could a creditor of David Scott have avoided this conveyance to his daughter as fraudulent under the law of this state? If he could, then the trustee in bankruptcy may do so, but otherwise not.

We are met at the outset by the finding of the trial court that there was no intent to hinder, delay, or defraud creditors. We must assume this finding to be supported by the evidence, and unless other facts found show conclusively such fraudulent intent the conclusions of law must be sustained. The question of fraudulent intent is one of fact, unless the intent appears conclusively from the face of the instrument. A voluntary conveyance is presumptively fraudulent as to existing creditors, but it has long been settled in this state that it is not conclusively so. Filley v. Register, 4 Minn. 296 (391), 77 Am. Dec. 522. An intent by the grantor to hinder, delay, or defraud his creditors is a necessary element. The intent must exist at the time the transfer is made. It may be implied conclusively from the circumstances surrounding the transfer, as where a debtor is insolvent, or fails to retain sufficient property to amply satisfy existing claims against him.

But the question whether the debtor was insolvent, or whether he retained property sufficient to pay his existing creditors, is also a question of fact, to be determined by the jury or the court as the case may be. The rule undoubtedly is that the debtor must retain enough property to amply satisfy his creditors. But the trial court in this case has found that the reasonable value of the unexempt property retained by Scott was greater than the sum of his then existing debts, and that he was solvent at the time. It is true that the figures show but a slight excess of assets; but a finding that they were of the reasonable value of $2,500 is equivalent to a finding that they would produce that sum, had the creditors then sought to collect their

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claims. The evidence is not before us, and we cannot say that the creditors could not have received payment in full out of the unexempt property retained by Scott, if they had pressed their claims at the time. The fact that the unexempt property owned by the bankrupt a year later brought much less at a forced sale cannot be considered as evidence of the value of his property at the time of the conveyance, much less as sufficient to overturn the finding of the trial court.

4. We do not assent to the proposition that the exempt property of the debtor is to be considered in determining the question of his solvency. The decisions holding to this view are based on the language of section 1, subd. 15, of the bankruptcy act, defining when a person shall be deemed "insolvent" within the provisions of the act. But, granting that this construction of subdivision 15 is correct, under section 70e the fraudulent character of the conveyance is not to be determined from the language of the bankruptcy act, but from the laws of this state. The incidental question of what constitutes insolvency should also be decided according to such laws. We therefore dispose of the case on the theory that the exempt property of the debtor is not to be considered. The trial court was right, however, in excluding from the indebtedness of Scott, in determining his solvency, the debt that was secured by a mortgage on the tract conveyed.

We have not thought it necessary to cite authorities to the different propositions of law above stated. Most of them are thoroughly well settled. We refer to Dunnell, Minn. Digest, §§ 3844, 3846, 3848, 3872, 3873; Dorwin v. Patton, 101 Minn. 344, 112 N. W. 266; Hessian v. Patten, 154 Fed. 829, 83 C. C. A. 545.

We hold that the conclusions of law are justified by the facts found, and that the judgment in favor of defendants must stand.

Judgment affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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GAWEN W. GIBSON v. CHICAGO GREAT WESTERN RAILROAD COMPANY.[1]

February 9, 1912.

Nos. 17,418—(227).

Accident at street crossing — questions for the jury — damages.

Plaintiff's foot was caught and held in the space between the planking and a rail of defendant's tracks at a street crossing, and was run over by an engine. It is *held:*

1. Whether defendant should have filled or blocked the space underneath the ball of the rail was not primarily a problem in engineering for the solution of defendant's officers and engineers; but whether defendant was negligent in this respect was, on the evidence, a question of fact for the jury.

2. Whether the engineer, in charge of the engine that ran over plaintiff, used reasonable care to stop his engine after discovering that plaintiff's foot was caught, was a question for the jury, and the evidence was sufficient to sustain the verdict on this point.

3. There was no prejudicial error in the rulings on the trial.

4. The damages are not excessive.

Action in the district court for Ramsey county to recover $25,000 for personal injuries. The complaint, among other matters, quoted in full section 2054 of the Annotated Code of Iowa, 1897; Acts of 1909, c. 219; and section 2071 of the Supplement to the Code, 1907, as amended by Acts 1909, c. 124. The answer, after alleging that the accident was caused solely through plaintiff's negligence, admitted that the statutes quoted in the complaint were enacted prior to the accident and had not been repealed, but alleged that the Constitution of Iowa provided: "All laws of a general nature shall have a uniform operation; a general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." The answer further alleged that under the Iowa common law in order to recover

[1] Reported in 134 N. W. 516.

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for another's negligence complainant should prove absence of negligence on his part. The reply was a general denial. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict in favor of plaintiff for $12,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Briggs, Thygeson & Everall, for appellant.

Samuel A. Anderson and *A. F. Storey,* for respondent.

BUNN, J.

Plaintiff was the conductor of a freight train of defendant that reached Dyersville, Iowa, during the morning of December 6, 1910, and stopped at the water tank, just east of a street crossing, which was less than a block east of the station. His engine was out of repair, and it became necessary to move it to a side track west of the station. When this was done, another engine was to move the train from the main track to a side track, where it was to remain until the first engine was repaired. Plaintiff watched to see that his engine was put away properly, and in so doing walked back and forth between the water tank and the station. As he was walking east on the main track at the street crossing in company with the trainmaster, he knew that engine 600 was coming from the west to couple to his train. The trainmaster called to him to "Look out, Gib, there comes that engine!" Plaintiff turned, saw that the engine was approaching, and took a step to get off the track, when his right foot went down in the space between the planking and the north rail, and was caught and held there. The trainmaster gave the engine a stop signal. Plaintiff made every effort to extricate his foot, but was unable to do so. The trainmaster pulled him to one side, and his foot was run over by the pony truck wheels of the engine. The injury resulted in an amputation between the knee and the ankle.

This action was to recover damages for the injuries so received. The charges of negligence were substantially these: (1) The crossing was unsafe, in that the space between the rail and the planking was such that the foot of any passer-by or a person walking along

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the track would be likely to step into the space and underneath the ball of the rail, and there be caught and held. (2) The engineer on the engine that ran over plaintiff failed to use reasonable care to avoid the accident after knowledge that plaintiff was caught. The trial court submitted these issues to the jury, which found a verdict in favor of plaintiff in the sum of $12,500. Defendant moved for judgment notwithstanding the verdict or for a new trial, and appealed from an order denying such motion.

1. Defendant's first contention is that it was not for the jury to decide whether defendant was negligent in leaving the space between the plank and the rail unfilled, for the reason that this was purely an engineering problem. The crossing was at grade, and over the principal street of Dyersville, a city or village of a population of over three thousand. The tops of the rails were practically on a level with the planking on both sides. The space between the ball of the rail and the plank was two and one half inches. All of the space underneath the ball of the rail was open, there being no blocking or filling of any kind. There was evidence from experts as to a custom of filling or blocking these spaces, as well as expert evidence of a contrary custom. The trial court held that no negligence could be found from the width of the space, but left it to the jury to say whether ordinary care required defendant to fill in or block the space underneath.

It is quite plain to us that the situation constituted a danger both to employees and to persons crossing the tracks, and that the evidence made a case for the jury, unless we sustain defendant's point that this was purely a problem in engineering. There is no doubt that railroad companies must consider the safety of passengers and those riding on their trains, as well as the safety of employees working upon the tracks or of people crossing them; and if it fairly appeared that filling or blocking the spaces between rails and planking at street crossings was dangerous to passengers or employees riding on trains, it would be right to say that it is for the officers and engineers of the railway company to determine the safest course, basing their decision on their judgment and past experience.

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This doctrine has been applied to a curve in a track (Tuttle v. Detroit, G. H. & M. Ry. 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114), to blocking frogs (Gilbert v. Burlington, C. R. & N. R. Co. 128 Fed. 529, 63 C. C. A. 27), and to various other conditions.

In Dolge v. Northern Pacific Ry. Co. 107 Minn. 242, 119 N. W. 1066, 26 L.R.A.(N.S.) 600, the question was as to what throw was necessary for a split switch, and this court decided that the question was not to be determined from the standpoint alone of the greatest safety to switchmen or others who have occasion to walk on the tracks, but "that in constructing and operating railroads every question which enters into the problem must be considered, and if those competent to judge of such matters have decided that safe railroading requires the maintenance of a space from four to five inches, no negligence can be predicated upon the adoption of such a standard."

In Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 115 N. W. 949, the question was as to whether a sufficient clearance distance was left between a freight platform and the track, and defendant insisted that this was primarily an engineering proposition. This court referred to the Tuttle case and others, but held that the case before it involved no engineering problem of technical character. The late Mr. Justice Jaggard said in the opinion: "In general, a railroad has the right to construct its own road—to solve its own engineering problems in accordance with its own views. * * * It by no means follows that it may disregard rules of law for the protection of the public, passengers, or employees."

In the case at bar rules of law required that the crossing be safe for the protection of the public, as well as employees. In the matter of the distance between the rail and the plank, the principle contended for can well be applied, as modern large engines may require that space; but in the matter of blocking and filling the space underneath we are unable to see any problem for engineers. It is true that defendant's witnesses testified that if the space were filled, either with dirt or a rail, objects might fall upon the filling and cause derailment, and that a filled crossing is not as safe, in general, as an open one; but this evidence does not impress us as making this an en-

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gineering problem, or anything more than a question of fact for a jury. We cannot escape from the idea that it would have been easily possible to guard against such an accident as this, without thereby endangering the safety of passengers, employees, or property, and without interfering with the operation of trains. The space underneath the ball of the rail was clearly useless, and blocking or filling would have been a simple matter. We think the question was for the jury.

2. Defendant argues earnestly that there was no competent evidence tending to show negligence in the operation of the engine. The only negligence submitted to the jury in this connection was the engineer's failure to stop the engine before it ran over plaintiff's foot after receiving the stop signal. Plaintiff testified that the engine was at least one hundred feet away when his foot was caught, and that it was running at a speed of four or five miles per hour. If the jury was warranted in believing this, then, in view of the evidence that the engine could have been stopped within thirty feet, a finding was justified that the engineer did not do all that he ought to have done toward stopping his engine. The entire question is whether plaintiff's evidence as to the distance away of the engine and its speed was worthy of belief. We are unable to say that it was not.

Estimates of distance and speed are always more or less unreliable; but plaintiff was as much entitled to his guess as was the engineer or the trainmaster, who testified for defendant. He was in as good a position to make an estimate as any of the witnesses, and it was for the jury to decide whose testimony should be believed. In short, the whole question was peculiarly one of fact, and, while it must be conceded that there was much testimony tending to show that the engineer did all he could do to stop his train, we cannot hold that it was conclusive, or that the trial court abused its discretion in refusing a new trial.

3. It is claimed that the complaint did not allege as negligence defendant's failure to fill or block the space, and therefore that the evidence should have been excluded, and the jury not permitted to base a verdict on negligence in this respect. The complaint alleges

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substantially that the space was left unfilled, but does not charge that this was negligence. This point is too technical. In view of the entire complaint, and the nature of the objection made when the evidence was offered, we cannot sustain defendant in the contention made in this regard.

It is claimed that the trial court in its charge adopted an erroneous standard of care, when it said that it was defendant's duty to construct and maintain the crossing in as safe a condition as it was "practicable and feasible" to do. But the court repeatedly told the jury that reasonable care was all that was required, and correctly defined reasonable care. Taking the charge as a whole, it is clear and correct, and the jury could not have been misled.

It is also contended that it was error to refuse to instruct the jury on the question of assumption of risk. We think that, under the Iowa statutes pleaded and in evidence, the trial court was correct in holding that assumption of risk was not a defense. In saying this we do not intimate that without these statutes it would have been error to refuse the instruction on this point.

Errors are assigned as to the admission of testimony and as to the refusal of the court to give certain instructions requested. We hold that there was no prejudicial error in any of the rulings.

5. Are the damages so excessive as to indicate passion or prejudice? The verdict is a large one. The amount is greater than we would have awarded. But the amount was not so exorbitant as to shock the sense of the trial court, and the question before us is still narrower: Is the amount so large that it clearly appears therefrom that the trial court abused its sound discretion in permitting the verdict to stand?

This court has not and cannot set a standard as to the limit of damages to be awarded for the loss of an arm or a leg.

In the case at bar we have an award of $12,500 for the loss of a leg below the knee, without unusual suffering and with as good a result as possible. Plaintiff was thirty-nine years old. His career as a railroad brakeman and conductor was ended by the accident. On the whole, we feel unwilling to say that the trial court abused its

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sound discretion in refusing to set aside or reduce the verdict as excessive.

We have not overlooked defendant's point that, under the comparative negligence statute of Iowa, in case plaintiff is guilty of contributory negligence, the damages should be diminished by the jury in proportion to the amount his negligence contributed to cause his injuries. It certainly did not conclusively appear that plaintiff was guilty of any negligence, and we are not justified in assuming that the jury found that he was negligent.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

GEORGE B. BROWN v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

February 9, 1912.

Nos. 17,425—(223).

Injury to servant — questions for jury.

The plaintiff, an employee of the defendant railway company, while working on its railway track, was struck and injured by a passing train. Evidence considered, and *held* that it was sufficient to take the case out of the general rule that ordinarily trainmen are not required to give warning of the approach of the train to workmen on the track, and that it made the question of the defendant's negligence and the contributory negligence of the plaintiff one of fact for the jury.

Action in the district court for Ramsey county to recover $30,150 for personal injuries. The case was tried before Brill, J., who, at the close of the trial denied defendant's motion for a directed verdict in its favor, and a jury which returned a verdict in favor of plaintiff

[1] Reported in 134 N. W. 315.

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for $4,582. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Morton Barrows, for appellant.

Arthur Christofferson and *C. D. O'Brien,* for respondent.

START, C. J.

On June 20, 1908, the plaintiff was in the employ of the defendant railway company as a day laborer, and while engaged in digging a hole under a railway tie on the defendant's right of way he was struck by a passing train and thereby seriously injured. He brought this action in the district court of the county of Ramsey to recover damages for his injuries, on the alleged ground that the defendant negligently ran its train upon him, while he was absorbed in his work, without ringing the bell or blowing the whistle, or giving any warning of the approach of the train. The defense, in effect, was that the defendant was not negligent in the premises, and that the plaintiff's injury was the result of his own negligence. The defendant, at the close of the evidence, requested the court to direct a verdict in its favor, for the reason that there was no evidence to sustain a finding that it was negligent, and, further, that the evidence conclusively showed that the plaintiff was guilty of contributory negligence. The request was denied, and the cause submitted to the jury, a verdict returned for the plaintiff for $4,582, and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict or a new trial.

The question whether the evidence was sufficient to sustain a finding that the defendant was negligent depends upon whether there was evidence tending to show such exceptional circumstances as to take the case out of the general rule that ordinarily it is not the duty of trainmen to give notice or warning to workmen on or near the railway track. Schulz v. Chicago, M. & St. P. Ry. Co. 57 Minn. 271, 59 N. W. 192. The general rule and the exceptions were recognized by the trial court, and the case was clearly and concisely submitted to the jury in a manner satisfactory to both parties.

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There was evidence tending to show that the plaintiff at the time of the accident was engaged in the work of putting in a switch on the defendant's railway track at a point some three hundred feet west of the defendant's bridge over the St. Croix river; that at a point one hundred one feet west from where the plaintiff was at work there was a signal board, requiring trains to stop at that point, from which there was an unobstructed view toward the west for a mile; that defendant's freight train, about ten minutes before the accident, stopped at the signal board, gave a signal of its approach, the plaintiff stepped aside from the track, and the train safely passed him; that the plaintiff resumed his work, and while absorbed therein, stooping down with his back toward the point from whence the passenger train was approaching, the wind blowing from the southeast, which interfered to some extent with his hearing the train, it came down the grade at a high rate of speed with the steam shut off, without stopping at the signal board or giving any warning of its approach, and struck and injured him; that he did not see or hear its approach; that the engineer and fireman both saw the plaintiff working upon the track at a point some five hundred or six hundred feet from them, but after that the engineer's view of him was cut off by a curve in the track; that he was, however, in view of the fireman until he was struck; and, further, that neither the engineer nor the fireman took any measures to lessen the speed of the train, or to warn the plaintiff, or to avoid the collision until it was too late.

The evidence as to many of these evidentiary facts was radically conflicting, especially as to the failure to ring the bell, or blow the whistle, or give warning of the approach of the train. In making this statement we have, as we must for the purposes of this appeal, taken the most favorable view permissible of the evidence for the plaintiff.

The evidence relevant to the question of the contributory negligence of the plaintiff is substantially as stated, except that on his cross-examination he testified as follows: "Q. What you expected to warn you was sound of some kind? A. Yes, sir; I expected a signal. Q. You relied entirely on your ears to protect you, and not

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at all on your eyes? A. Yes, sir. Q. Although there was nothing at all to prevent your looking for three-quarters of a mile up the track? A. It always takes a man quite a little time for to turn around from his work. If I had stood looking up the track half the time, I couldn't have dug the hole. Q. There was nothing to prevent your seeing the train coming for three-quarters of a mile up the track, was there? A. No, sir."

We regard this as a border case, but upon a consideration of the whole evidence we are of the opinion that it was sufficient, if satisfactory to the jury, to sustain the finding of the evidentiary facts stated, and that fair-minded men might well draw therefrom different conclusions as to the defendant's negligence and the contributory negligence of the plaintiff. We accordingly hold that each question was one of fact for the jury, that the defendant was not entitled to an instructed verdict, and that the verdict is sustained by the evidence.

Order affirmed.

BUNN, J., took no part.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

GEORGE A. LA PRAY v. LAVORIS CHEMICAL COMPANY and Another.[1]

February 9, 1912.

Nos. 17,429—(224).

Injury to servant of tenant — liability of landlord.

The appellant was the owner of a building in which there was a freight elevator maintained by it for the use of its tenants and their employees.

[1] Reported in 134 N. W. 313.

[Note] Liability of owner for injury to tenant's guests or employees by defect in premises generally, see note in 17 L.R.A.(N.S.) 1161.

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The plaintiff's intestate, an employee, was killed by the alleged negligence of appellant in failing to keep the elevator in a safe condition. *Held:*

1. That it was not necessary to show that the landlord had actual notice of the unsafe condition of the elevator in order to charge him with negligence, for it was sufficient to show that he either knew, or by the exercise of ordinary care he might have known, its condition.

2. If the evidence in a personal injury case leaves the question of causal connection between the injury and the alleged negligence a matter of conjecture only, the defendant is entitled to a directed verdict; but it is not necessary to prove such connection by direct evidence. It is sufficient if the circumstantial evidence furnishes a reasonable basis for the inference that the injury was caused by the negligence.

3. Where a person is killed by the negligence of another, it cannot be inferred that he was guilty of contributory negligence, unless the undisputed evidence clearly and fully rebuts the presumption that he exercised due care for his safety.

4. The evidence was sufficient to sustain a finding by the jury that the appellant was negligent in the care of the elevator, which was the proximate cause of the death of the deceased, who was not guilty of contributory negligence. The verdict is sustained by the evidence.

5. There were no reversible errors in the rulings of the trial court as to the admission of evidence.

Action in the district court for Hennepin county by the administrator of the estate of Chester A. La Pray, deceased, to recover $5,100 for the death of his intestate. The answer of Lavoris Chemical Company alleged that deceased was killed by his own carelessness and not by any fault or neglect on its part. The separate answer of the Penn-Minn Realty & Investment Company denied that the elevator was ever in a dangerous, defective or unsafe condition and denied that it was ever used when it did not work properly. The action was tried before John Day Smith, J., and a jury which returned a verdict in favor of plaintiff against defendant Penn-Minn Realty & Investment Company for $2,500 and in favor of the Lavoris Chemical Company. From an order, Booth, J., denying its motion for judgment notwithstanding the verdict or for a new trial, the Penn-Minn Realty & Investment Company appealed. Affirmed.

Edward T. Teitsworth, for appellant.

Ayers & McDonald and *F. E. Clinite,* for respondent.

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START, C. J.

The defendant Penn-Minn Realty & Investment Company, hereafter referred to as the Investment Company, was at the times herein stated the owner of a certain building in the city of Minneapolis, known as the "Burd Building," and the defendant Lavoris Chemical Company, hereafter referred to as the Chemical Company, was the lessee of the fifth floor of the building. This building was equipped with an electric freight elevator running from the basement to the top floor, which was maintained by the Investment Company, pursuant to its agreement, for the use of its several tenants of the building and their employees.

The plaintiff's intestate, a boy sixteen and one half years old, was in the employ of the Chemical Company, and on October 20, 1909, was killed by the elevator. This action was brought in the district court of the county of Hennepin to recover damages on account of his death, on the alleged ground that it was caused by the defective and unsafe condition of the elevator. The jury found a verdict in favor of the Chemical Company and against the Investment Company for $2,500. It appealed from an order denying its motion for judgment or a new trial.

The appellant bases its claim for a reversal of the order upon the contention that the evidence as a matter of law was not sufficient to sustain a finding that the elevator was in a defective and unsafe condition, or that the appellant was negligent in failing to maintain it in a safe condition; that, even if the elevator was in an unsafe condition, the evidence is not sufficient to sustain a finding that it was the cause of the intestate's death, but leaves it a mere matter of conjecture; that the evidence conclusively shows that the intestate was guilty of contributory negligence; and, further, that the trial court committed reversible errors in its rulings as to the admission of evidence.

These several claims, except the last one, may be considered together, as they are closely connected by the evidence. The law applicable to them is well settled, and only a brief statement thereof is necessary. It is not necessary to show that a landlord, who has

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undertaken to maintain the demised premises or any of their appliances in a safe condition, had actual notice of their unsafe condition in order to charge him with negligence; for it is sufficient if it be shown that he either knew, or by the exercise of ordinary care he might have known, their condition. Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289.

If the evidence in a personal injury case leaves the question of causal connection between the alleged negligence and the injury a matter of conjecture only, the defendant is entitled to a directed verdict; but it is not necessary to prove such connection by direct evidence. It is sufficient if the circumstantial evidence furnishes a reasonable basis for the inference of the ultimate fact that the injury was caused by the negligence; but the evidence is not sufficient, if it is merely consistent with the plaintiff's theory of how the accident occurred. Rogers v. Minneapolis & St. Louis Ry. Co. 99 Minn. 34, 108 N. W. 868; Moores v. Northern Pacific Ry. Co. 108 Minn. 100, 121 N. W. 392; Bruckman v. Chicago, St. P., M. & O. Ry. Co. 110 Minn. 308, 125 N. W. 263.

Where a person is killed by the negligence of another, it cannot be inferred that he was guilty of negligence contributing to his death, unless the undisputed evidence clearly and fully rebuts the presumption that he exercised due care for his safety. Knudson v. Great Northern Ry. Co. 114 Minn. 244, 130 N. W. 994; Gilbert v. City of Tracy, 115 Minn. 443, 132 N. W. 752.

The evidence with reference to the condition of the elevator and the care exercised by the appellant to secure its safety was sufficient, if satisfactory to the jury, to sustain a finding of these facts:

The elevator shaft was equipped with iron fire doors and automatic safety gates. At the basement floor there were two iron fire doors, which opened out from the elevator shaft, on the basement floor, with weights attached to pull them shut, and a hook on each door to fasten them open. An automatic wooden safety gate went down when the elevator went up, in the same ratio of speed as the elevator, and closed the approach to the elevator shaft. The elevator was installed a little over a year before the accident. It was then inspected and

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found to be in a safe condition and in good working order. It was subsequently inspected, the last time being some two months next before the accident. Intervening the last inspection and the accident it was in an unsafe condition, and had been for several weeks. When the elevator was in a safe and normal condition, it would, when it reached the lowest floor, the basement, automatically cut off the power and set the brakes, which prevented it from starting again until the power was put on, which was done by moving the cable rope attached to the operating sheave on the machine. In its normal condition the elevator, when in operation, traveled seventy-five feet a minute. It was inspected promptly after the accident, and found to be in an unsafe condition, in that it would not remain stationary when it reached its limit, the terminal level below the basement, but would reverse itself and again start upwards. At different times for several weeks before the accident the elevator, by reason of its defective condition, would, when sent to the basement, reverse itself and start upwards, instead of remaining stationary until the power was applied. This condition might have been discovered and remedied before the accident by proper inspection.

On the morning of the accident the deceased, who was in the line of his duty as an employee of the Chemical Company, gathered up the refuse of the day before on the fifth floor of the building, placing it in boxes, two at least, loaded them into the elevator, and started with it for the basement. The fireman of the building called to him, at the time he reached the basement, and inquired if he could get the elevator. The reply was, "Yes, wait a minute." The fireman heard the elevator moving and went to the shaft and saw that the elevator was moving upwards, and that the deceased was caught between the floor of the elevator and the safety gates. The fireman then jumped on the elevator, reversed it, and the body of the deceased dropped underneath the elevator to the bottom of the shaft. When first discovered, his head and shoulders were turned towards the cable rope on the floor of the elevator, with his legs hanging off, and he was trying to extricate himself. He was dead before he was released. He had unloaded all of the boxes, except one, which was found on the

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elevator, while the others were found on the basement floor near the elevator opening.

The evidence as to some of these facts was conflicting. It is quite clear that the evidence was amply sufficient to sustain a finding that the elevator was in an unsafe condition, as claimed, and to charge the defendant with negligence in the premises. It is also quite obvious that, if the unsafe condition of the elevator was the proximate cause of the death of deceased, he was not, in view of his youth and inexperience, guilty of contributory negligence as a matter of law. The pivotal question is, then: What was the cause of his death?

The appellant claims in this connection that the only reasonable conclusion from the evidence is that the intestate, when off the elevator, on the basement floor, after being asked for the elevator by the fireman, and not having fully disposed of the rubbish taken down, reached in from the basement floor and pulled the cable rope to send the elevator up to the fireman, intending himself to remain in the basement to finish his work there, and that when the elevator started up the safety gate came down and caught him between the gate and the elevator floor, and, being unable to extricate himself, he was killed.

On the other hand, the contention of the respondent is that the only reasonable conclusion to be drawn from the evidence is to the effect that the deceased was in the act of reaching in to take the last box from the elevator, when it started up, having reversed itself, and caught and pinioned him as stated, or, seeing that the elevator had reversed and was moving upward, but not appreciating the danger, he tried to get on and stop it, and in so doing was caught and killed.

One thing is certain from the evidence: The deceased was killed by the elevator starting upwards, and the question is: What caused it so to start? The record and the claims of the respective parties indicate that the cause must have been either the act of the deceased in reaching and pulling the cable rope to send the elevator up to the fireman, as the appellant claims, or that the elevator by reason of its defective condition reversed itself, as the respondent claims. The

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jury upon the evidence might well have found the claim of the appellant an unreasonable one; hence they rejected it. Why would the deceased send the elevator up to the fireman, who had been told to wait a minute, before he had taken off the last box, which would not have taken him more than a minute? On the other hand, the natural inferences from the evidence are not only consistent with the claim that the elevator started upwards by reason of its defective and unsafe condition, but they point with reasonable certainty to that conclusion. We are of the opinion that the evidence does not leave the cause of the death of the deceased a matter of speculation or conjecture, but that it is sufficient to sustain a finding that the cause was the defective condition of the elevator. Such being the case, we hold that the questions of the appellant's negligence and the contributory negligence of the deceased were each one of fact to be decided by the jury, and that their verdict is sustained by the evidence.

The other assignments of error relate to the rulings of the trial court on the admission of evidence. The plaintiff called the fireman as a witness and examined him as to the accident The appellant subsequently called the fireman as a witness on its own behalf, who gave testimony contrary to previous statements made by him, as plaintiff claimed. Thereupon the plaintiff, upon laying the proper foundation therefor, was permitted to show, over the objection and exception of the defendant, that the witness did make the previous statements. This was not reversible error. Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L.R.A.(N.S.) 729; 2 Wigmore, Evidence, § 903.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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STATE ex rel. WINONA MOTOR COMPANY v. MINNESOTA TAX COMMISSION.[1]

February 9, 1912.

Nos. 17,440—(12).

Act taxing money and credits construed.

Chapter 285, Laws 1911, providing for the taxation of money and credits, *held* a complete revision of prior statutes upon the subject, and that it was designed by the legislature as the exclusive guide upon that subject, save as provisions of the general tax laws are therein referred to and called to the aid of the new statute, and to repeal by implication section 836, R. L. 1905, which provides for the deduction of debts from credits listed for taxation.

Constitution.

The classification of money and credits for the purposes of taxation *held* not a violation of the Constitution.

Upon petition of the Winona Motor Company, this court granted a writ of certiorari to review the action of the Minnesota Tax Commission in refusing to abate petitioner's assessment of credits made pursuant to Laws 1911, c. 285. Writ discharged.

Brown, Abbott, & Somsen, for relator.

Lyndon A. Smith, Attorney General, and *William J. Stevenson,* Assistant Attorney General, for respondent.

BROWN, J.

Relator, a corporation, properly listed its "credits" for taxation under and pursuant to chapter 285, p. 397, Laws 1911, and claimed the right to have its debts deducted therefrom under the provisions of section 836, R. L. 1905. This claim was duly presented to the State Tax Commission in the form of an application for an abatement, but was not sustained by the commission. The tax was ordered levied

[1] Reported in 134 N. W. 643.

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for the value of the listed credits as fixed by the assessor, and relator sued out this writ of certiorari to review the action and decision of the commission.

It is contended by relator: (1) That the commission erred, to the prejudice of relator's legal rights, in refusing to deduct its debts from the listed credits; and (2) that, if the act of 1911 be construed as repealing by implication section 836, R. L. 1905, providing for the deduction, it is unconstitutional and void.

1. Prior to the passage of chapter 285, p. 397, Laws 1911, the statute here under consideration, it had been the uniform policy of the state, whether rightfully or otherwise is not material, to allow a deduction of debts from an assessment of taxes upon credits, and section 836, R. L. 1905, so providing, has remained substantially in its present form since 1860. Since that year credits have been taxable on the basis of their net value, arrived at by a deduction of debts. The substantial question in the case is whether that policy was departed from by the act of 1911.

The attempt to tax credits has never been either successful or entirely satisfactory, and the statutes providing therefor have been of little value as revenue producers. The value of unsecured debts is at most uncertain, many being concededly wholly worthless, and attempts of the state to tax them at the rate imposed upon other classes of property have resulted in efforts to evade a proper listing and more or less laxity on the part of assessors. This situation and the generally unsatisfactory operation of prior statutes authorizing this class of taxation led the legislature to attempt an improvement, and the act under consideration was the result of its labors in that behalf. The new statute makes no reference to the deduction of debts, and contains no clause or section repealing other enactments upon the subject, and the ultimate inquiry upon this branch of the case is whether section 836, R. L. 1905, which provides for such deductions, was repealed by implication. We have given the subject careful consideration, and reach the conclusion that the question must be answered in the affirmative.

The new statute contains thirteen sections, all substantially orig-

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inal, and covering the entire subject of taxing money and credits. It was evidently drawn with care, and intended as a complete revision of all prior statutes, and as a departure in point of substance and procedure from the former method of such taxation. In connection with references therein expressly made to sections and provisions of prior statutes, it presents a comprehensive workable system for the levy and collection of the tax imposed. The first section adopts the definition of "credits" as found in section 798, R. L. 1905, and provides that such credits "shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof." All following sections relate to the procedure for the assessment and collection of the tax, calling to the aid of the act several sections of the Revised Laws of 1905, but making no reference, directly or indirectly, to the question of deductions provided for by section 836. The act is so complete and so fully covers the subject as to bring it within the general rule of implied repeal of all prior statutes upon the subject which are not expressly referred to and made a part of the new law. This rule applies, though the new statute contains nothing expressly repugnant to some pertinent provisions found in prior statutes.

The inquiry is: Did the legislature intend the new statute as the only rule upon the subject-matter of the legislation? Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375. If the present statute had been in the form of amendments to former statutes, the situation would be different. In such cases no inferences necessarily arise, there being no repugnancy or inconsistency between the old and the amended statute, that any change in the law was intended, except as expressly made. But here the new statute is complete in itself, and comes clearly within the rule of implied repeal. There can be no serious question but that the legislature intended a modification of the policy of the state in respect to this form of taxation. The lawmakers recognized the difficulties encountered under the old system, and, to avoid the injustice of taxing credits at the rate imposed upon other property, the new system was devised, and the tax laid and fixed at a very low rate. If there had been

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any intention to continue in force the policy of allowing the deduction of debts, the rate would undoubtedly not have been changed, and the reduction thereof to a minimum is fairly indicative of a purpose, as disclosed in section 1, to tax all credits at their fair cash value, without reference to debts and obligations of the person listing the same. This complete revision of the law brings the statute fairly within our decisions holding to the rule of implied repeal. Smith v. County of Nobles, 37 Minn. 535, 35 N. W. 383; State v. St. Paul, M. & M. Ry. Co. 40 Minn. 353, 42 N. W. 21; Ellington v. Great Northern Ry. Co. 96 Minn. 176, 104 N. W. 827; Kelly v. City of Faribault, 83 Minn. 9, 85 N. W. 720; 3 Dunnell, Minn. Digest, § 8927.

Though this result leads to a departure from the long-settled policy of the state to allow the deduction of debts in taxation of this kind, that policy was at its inception of doubtful merit, in that it extended to one class of taxpayers a favor not granted to others. It permitted the taxpayer holding credits to deduct his debts from the amount of his assessment, and denied the right to any owner of other property who was also in debt. In fact, the Attorney General expressly disapproved of this policy when first adopted. Opinions Attorneys General (Edition 1858–1884) 148–150. While both courts and legislatures should hesitate before departing from a long-settled policy of the law, the cause for hesitation arises more particularly when the departure is from a policy having a sound and substantial basis, and not one of doubtful merit, or, to use the language of General Cole, in the opinion above referred to, a policy that amounts to "a palpable violation of the Constitution."

Our conclusion, therefore, upon this branch of the case, is that the act of 1911 was intended by the legislature as a new rule in respect to the taxation of money and credits, that the statute is a complete revision of prior enactments, and repeals by implication section 836.

2. The further contention that the statute as so construed is unconstitutional, because the classification violates section 1 of article 9 of the state Constitution, requires no extended discussion. We

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have no doubt, under the amended Constitution, that the classification of money and credits for the purposes of taxation is within the discretion of the legislature, and that this act is a fair exercise thereof. It is not unreasonable, and the nature and character of the property suggests the propriety of a separate method for its assessment. The question is fully covered by Mutual Benefit L. I. Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572. A further discussion of the question would serve no useful purpose, but result only in a repetition of what has been said before upon the same general subject, and we therefore conclude by holding the objection to the constitutionality of the statute not well taken.

Writ discharged.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

FRANK R. HUBACHEK v. MAXBASS SECURITY BANK.[1]

February 9, 1912.

Nos. 17,447—(214).

Unmarketable title — sale by guardian.

In an action involving an executory contract for the sale of real property located in the state of North Dakota, the title to a part of which was acquired through a guardian's sale, it is *held* that the failure of the guardian to give the sale bond required by the statutes of that state justified the vendee in refusing the title as not marketable.

Action in the district court for Hennepin county to recover $1,000 which defendant had converted to its own use. The answer was a

[1] Reported in 134 N. W. 640.

[Note] Necessity of bond by guardian to make his sale of land valid, see note in 33 L.R.A. 761.

What is a marketable title, see note in 4 L.R.A.(N.S.) 1170.

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general denial. The case was tried before Holt, J., who made findings and as conclusions of law found that the contract in question was void at the expiration of six months from and after July 25, 1910; that there was sufficient uncertainty as to the validity of the proceedings taken to divest the minors of their interest in a certain quarter section of land, that a court of equity should not in any event compel plaintiff to accept title to the land; that the three mortgages were valid and subsisting mortgages on the property, and that plaintiff was entitled to $1,000 with interest. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

W. A. McDowell, for appellant.

George S. Grimes and *Louis A. Hubachek,* for respondent.

BROWN, J.

The facts of this case, so far as pertinent to the controlling question, are as follows:

In June, 1910, plaintiff entered into a contract with Charles E. Fees and Elizabeth Fees, his wife, for the purchase of certain lands owned by the Fees in the state of North Dakota. The contract was executory, and required a conveyance of the land, three quarter sections, free and clear of all incumbrances, upon the payment by plaintiff of the purchase price, $35 per acre. At the time the contract was prepared and executed plaintiff paid $1,000 upon the purchase price, depositing the same with defendant in this action, to be paid over to the Fees on the completion of the transaction. Defendant was, according to the findings of the trial court, acting as the agent of the Fees. The contract contained, among other provisions, the following:

"The first parties [Fees] will, within fifteen days from this date, deliver to the second party [plaintiff] at his office in Minneapolis a complete abstract of title to said land prepared by a reliable abstracter. The second party shall have twenty days to examine the same, and if the title to said land is not perfect of record, and cannot be made so in the first parties within ninety days from this

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date, then this agreement shall be void, and the money deposited by the second party, as hereinafter provided, shall be returned to the second party at his said office; but if the title to said land is perfect of record, * * * or is made perfect * * * within the time aforesaid, and the balance of the purchase price is not paid as herein provided for, then the deposit this day made by the second party shall be forfeited to the first parties. Time is of the essence of this contract."

The abstract of title was furnished as required by the contract, and disclosed mortgages against a part of the land and a defect in the title to the remainder, and these facts were pointed out to defendant, representing the Fees.

It appears that the tract of land to which the title was claimed to be defective formerly was owned by one Katie Zeitler, who died intestate, leaving surviving her husband and two minor children. In the administration of her estate the probate court of Bottineau county, North Dakota, the court having jurisdiction thereof, decreed this land to the surviving husband, when by the laws of that state it descended in undivided third interests to the husband and minor children. This was brought about by means of some adjustment of the rights of the surviving husband and children, not necessary to be here stated. The Fees thereafter acquired by conveyance from the husband of Mrs. Zeitler the title so decreed to him by the probate court. This was one of the defects in the title of which plaintiff complained, and to enable the Fees to perfect it by proper proceedings in the probate court the time for the performance of the contract here involved was extended by written consent of the parties until January 25, 1911. It was then conceded by the parties that the probate decree assigning the land to the husband of Mrs. Zeitler, to the exclusion of the minor heirs, was void, and it was understood and agreed that the Fees should by proper proceedings in the Dakota courts acquire the title of the minors. To this end the Fees employed attorneys to conduct the proceeding.

The title was perfected, if at all, in this manner: A guardian for the persons and property of the children was duly appointed

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in North Dakota. The guardian petitioned the probate court to vacate the decree by which the land was assigned to the husband, and in August, 1910, the petition was granted, the former decree set aside, and a new one entered decreeing the husband and children the owners of the land in undivided third interests. Thereafter the guardian commenced proceedings for the sale of the interests of the minors, and an order of the probate court was duly entered authorizing the sale. The sale was subsequently made, and Charles E. Fees, one of the parties to this contract, became the purchaser. The minor children were six and nine years of age, respectively. Upon the report of the acquisition of this title in the manner stated, plaintiff discovered several defects therein and declined to accept it.

One of the defects so pointed out was the failure of the guardian to give the bond required by the statutes of North Dakota before making the sale of the land under the order of the court. The statutes of that state provide (section 8270, Revised Code 1905):

"Every guardian authorized to sell real estate must, before the sale, give bond with sufficient sureties, to be approved by the judge, with condition to sell the same in the manner and to account for the proceeds of the sale as provided for in this chapter and chapter 5 of this Code."

Section 8050 of chapter 5 provides that: "Whenever an executor, administrator or guardian is authorized to sell or mortgage any real estate, he must in like manner be required to give an additional bond in a sum equal to twice the probable amount to be realized upon such sale or mortgage. But such additional bond may be dispensed with by the decree authorizing such sale or mortgage, when it appears to the satisfaction of the court that the former bond of such executor, administrator or guardian is at least twice the value of the estate remaining in his hands together with the amount of such increased liability and is in all other respects sufficient."

At the time the guardian was appointed he gave the usual and necessary bond; but no additional bond was given prior to the sale as required by these statutes, nor was the giving of the same dispensed with, by the decree authorizing the sale or otherwise. This,

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in the opinion of plaintiff, rendered the guardian's sale void—at least, of doubtful validity—and he declined to accept the same. He was advised by an attorney of North Dakota that the title was defective and unmarketable. The title to the property not having been perfected within the time provided for by the contract, plaintiff elected, for this and other alleged defects therein, to rescind the contract and reclaim the money paid when the contract was entered into. The defendant refused to pay over the money, on the theory that the title to the land was perfect, and plaintiff brought this action to recover the same.

The action was tried below without a jury, and upon full findings of fact judgment was ordered for plaintiff. Defendant appealed from an order denying a new trial.

The contract by its terms terminated at the expiration of the time within which the Fees were to tender a valid title to the land. Mackay v. Ames, 31 Minn. 103, 16 N. W. 541; Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10. It also required of the Fees the tender of a marketable title, and we have only to determine whether such a title was tendered. Several objections were made by plaintiff to the title as disclosed by the abstract, the most prominent of which is indicated by the foregoing statement of facts. That defect involves the question whether the failure of the guardian to execute and file the sale bond as required by the statutes of North Dakota rendered the guardian's sale invalid, or, in any event, the title unmarketable. We come directly to that question.

The question whether the failure of a guardian to give the sale bond in cases of this character avoids the sale is one upon which the courts of the several states are not agreed. In this state the failure is held to render the sale void and of no effect. The same rule prevails in other states having similar statutory provisions. Babcock v. Cobb, 11 Minn. 247 (347); 1 Notes to Minn. Cases, 405, and citations there made.

The North Dakota statutes differ somewhat from those of this state; the chief difference being the absence there of the express provisions found in our statutes to the effect that a guardian's sale shall

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not be set aside if it shall appear, among other things, that the sale bond was given. Under special provisions of this kind it is held that if the bond is not given the sale may be set aside, even in a collateral action. Such provisions are not found in the North Dakota Code. But in states where the statutes are substantially the same as in North Dakota it has been held that the failure to give the required bond avoids the sale. Rucker v. Dyer, 44 Miss. 591; Hamilton v. Lockhart, 41 Miss. 460; Barnett v. Bull, 81 Ky. 127; William v. Morton, 38 Me. 47, 61 Am. Dec. 229; 21 Cyc. 132, and cases there cited.

Again, in California and Montana, under statutes like those of North Dakota, the failure is treated as an irregularity, and not fatal to the sale. Hughes v. Goodale, 26 Mont. 93, 66 Pac. 702, 91 Am. St. 410; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. 190. The Supreme Court of North Dakota has never passed upon the question, and whether, when it is presented, the court will adopt the rule of the California and Montana courts, or that applied by other states having the same, or substantially the same statutes, can only be a matter of speculation or conjecture. We were persuaded by counsel's oral presentation of the case that in all probability the North Dakota court will adopt the rule of the Montana and California courts. But from this it does not follow that a marketable title to the land in question was tendered plaintiff by the Fees.

The term "marketable title," as applied to real property, has, though variously defined by text writers and courts, a well-defined and well-understood meaning. It is applied alike by substantially all the courts, and for the primary purpose of protecting the vendee in executory contracts for the sale of land from the burden of litigation which may be necessary to remove apparent or real defects in the title. Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. 521; Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 4 L.R.A.(N.S.) 1170, 114 Am. St. 723. The subject was fully considered by Mr. Justice Elliott in the last case cited, and practically all the authori-

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ties upon the question were cited in the opinion rendered therein. A marketable title, as there defined, is one that is free from reasonable doubt; one that a prudent person, with full knowledge of all the facts, would be willing to accept. A title that may involve the purchaser in litigation to remove apparent or real defects appearing upon the face of the record is not one which the vendee will be compelled to accept. The question is, not whether a court would on the facts disclosed adjudge the title good, but whether, without the aid of a specific decision, the title is so far free from doubt that a reasonable person, acting in good faith, would accept it. The question must be considered from the standpoint of the intending purchaser, and not from the viewpoint of the court.

In the light of the authorities we have no particular difficulty in holding that plaintiff was justified in rejecting the title in question as not marketable—as one that might involve him in litigation to determine the legal effect of the failure of the guardian to give the sale bond. The decisions of the courts where the question has been passed upon are at variance, the Supreme Court of North Dakota has not spoken upon the subject, and plaintiff could not be required to anticipate a favorable decision of that tribunal, nor by accepting the title resolve the doubt in favor of the vendor.

Our conclusions, therefore, are in harmony with those of the learned trial court, and the order appealed from is affirmed.

HOLT, J., having tried the case below, took no part.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

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DAWSON SUNDELL v. VILLAGE OF TINTAH.[1]

February 9, 1912.

Nos. 17,461—(235).

Municipalities — care of streets.

Municipal corporations are under legal obligation to exercise reasonable care to keep and maintain all their streets and public places in safe condition for public use, and are liable for a negligent failure of compliance therewith.

Same.

The rule applies to all streets within the borders of the municipality, whether in the settled or platted part thereof or in the outlying districts, with the qualification of limitation that the same diligence and care is not required in respect to streets remote from the settled part of the municipality.

Action in the district court for Traverse county by the guardian ad litem of Dawson Sundell to recover $500 for personal injuries. From an order, Flaherty, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

F. W. Murphy, for appellant.

Charles E. Houston and *Jos. G. Forbes,* for respondent.

Brown, J.

Appeal from an order overruling a general demurrer to plaintiff's complaint. The complaint alleges the following facts:

Defendant is a municipal corporation, duly created and existing under and pursuant to the general laws of the state, with a population of two hundred seventeen people. Its territorial limits include sections 1, 2, 3, 10, 11, 12, 13, 14, and 15, township 129,

[1] Reported in 134 N. W. 639.

[Note] For the general question of the liability of a municipal corporation for defects or obstructions in streets, see note in 20 L.R.A.(N.S.) 513.

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range 45, in Traverse county; the platted and inhabited portion of the village being located upon section 1. Some time prior to July, 1910, there was constructed by the state, along the south line of sections 13, 14, and 15, a drainage ditch several feet in width and depth, which crossed a public highway leading from the village to the rural community beyond its limits. This highway was a public thoroughfare of the village, and had been generally traveled and used as such for many years. The point where it was so crossed by the public ditch is in the neighborhood of three and one half miles from the settled or platted portion of the village. A short time prior to the accident here complained of the authorities of the village removed an old and insufficient bridge over the ditch at the intersection of the highway for the purpose of constructing a new and more substantial structure in its place.

The complaint alleges in this connection that during the work of constructing the new bridge, between July 12, and July 29, 1910, the defendant knowingly, carelessly, and negligently permitted the ditch where it crosses the highway to at all times remain open, unprotected, unguarded, and unlighted, and without signals to advise or warn persons using the highway of the dangerous situation thus created; that on the evening of July 29, 1910, plaintiff, a passenger in an automobile driven by another person, was seriously injured by the sudden and unexpected fall of the machine into the ditch while being driven carefully along the highway, and without notice or warning of the dangerous condition created by the acts of defendant. It further alleges that the cause of the accident and ditching of the automobile was the negligence and carelessness of defendant in failing to place guards, lights, or barriers at the ditch as a warning to travelers upon the road.

The only question presented is whether, since the defect in the highway was remote from the settled or platted part of the village and on the extreme outskirts thereof, the village was under legal obligation to keep and maintain the highway at that point in reasonably safe condition for public use. It is the contention that under the circumstances stated the defendant was relieved from the care

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of the highway and was under no obligation to maintain it in safe condition for travel. We are unable to assent to this contention.

That municipal corporations, excluding the town and county, are under legal obligation to exercise reasonable care to keep and maintain their streets and public places in safe condition for public use, has long been the settled law of this and other states. And although founded upon an "illogical exception" to the general rule of the common law (Lane v. Minn. State Agricultural Society, 62 Minn. 175, 64 N. W. 382, 29 L.R.A. 708), no immunity from liability for reasons like those here assigned has been extended them by any of the decisions to which our attention has been called. There is force and perhaps merit in the argument, presented by counsel, that in the case of a small village like defendant, with a large territory, it would be a hardship to impose upon it the burden of caring for its outlying streets, where travel is infrequent. But we are unable to present a substantial reason for dividing the legal responsibility in this respect. To attempt to do so would lead to confusion in defining the precise limits, territorially, where the duty ceases, and any effort in that direction would be wholly arbitrary and without logical basis for support. We deem it, therefore, the part of wisdom to refrain from ingrafting upon the "illogical rule" an illogical limitation or exception.

The authorities, so far as our examination has extended, give an adverse answer to defendant's position. In City v. Powell, 50 Neb. 798, 70 N. W. 391, the court held, in a similar case, that it is the duty of a municipal corporation to keep *all* its streets and bridges in a reasonably safe condition for travel, whether located in one part of the city or another, and that its diligence in respect to them is not controlled or affected by the fact that a particular street is less frequently used than others. It was held in City v. Naney, 136 Ill. 45, 26 N. E. 645, that the fact that a sidewalk is in the suburbs of a city, and on a street but little used, does not relieve the municipality from liability for defects therein. In Village v. Kanode, 98 Ill. App. 373, the court held that the fact that the street is in the outskirts of the municipality does not relieve it from the duty to

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exercise reasonable care to keep and maintain it in safe condition for use. See also from the same state, Village v. Moore, 124 Ill. 133, 16 N. E. 246. The same rule is applied by the courts of Pennsylvania (Wall v. Pittsburg, 205 Pa. St. 48, 54 Atl. 497), and in other states (28 Cyc. 1362, and cases cited; City v. Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. 412). The only exception to the obligation to care for *all* the streets within the municipality is with respect to the degree of care upon those in outlying districts; it being held by many of the courts that a less degree of care is required as to those remote from the thickly settled part of the municipality. Monongahela v. Fischer, 111 Pa. St. 9, 2 Atl. 87. 56 Am. Rep. 241; 28 Cyc. 1362, note 60. This qualification seems reasonable, but beyond it the court cannot well go, without laying down and attempting to establish an arbitrary exception, which in all probability would require further qualification in future cases. We therefore follow the general rule of liability, applicable alike to all streets of the municipality, with the qualification that the same diligence and care is not required with respect to those in outlying districts.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

STATE ex rel. JOHN R. BULLARD v. M. Mc DONOUGH.[1]

February 9, 1912.

Nos. 17,498—(243).

Habeas corpus — contempt.

Held, that in a habeas corpus proceeding, where a duly elected and qualified judge of a municipal court is engaged in the hearing of a preliminary

[1] Reported in 134 N. W. 509.

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examination of a prisoner duly brought before him, he has jurisdiction to punish for contempt of court committed in open court, although there have been proceedings taken under section 131, R. L. 1905, to oust him of jurisdiction to hear that particular case.

Same — jurisdiction.

The commitment, fairly construed, shows that the court imposed a fine, and not a jail sentence; and, *held*, further, that he had authority to impose a fine of $10 and in default of payment to commit the offender to the county jail till the fine was paid, not exceeding ten days.

Irregularities not available to relator.

Irregularities in the procedure examined, and *held* not available to the relator under the proceedings in habeas corpus.

Upon the petition of John R. Bullard, the district court for Waseca county issued its writ of habeas corpus directed to M. McDonough, sheriff of that county. The matter was heard before the court commissioner of the county, who, at the close of the testimony, ordered the discharge of the prisoner, J. P. Wagner, from the custody of M. McDonough. From the order of discharge, respondent sheriff appealed. Reversed and prisoner remanded.

Fred W. Senn, Henry M. Gallagher and *E. B. Collester,* for appellant.

John R. Bullard and *Joseph N. Moonan,* for respondent.

HOLT, J.

Appeal by the respondent, the sheriff of Waseca county, Minnesota, from the order of the court commissioner of said county discharging a prisoner from his custody.

In the city of Waseca existed during the time herein referred to a municipal court, under the provisions of Laws 1895, p. 575, c. 229, and amendatory acts, and A. J. Lohren was the duly elected and acting judge thereof. On December 14, 1911, one John Brandt was brought before said court upon a warrant issued upon a complaint filed therein charging grand larceny. The preliminary hearing was adjourned till December 18, at two p. m., for the reason that neither party was then ready. Thereafter, on the same date, the

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prisoner filed an affidavit of prejudice against Judge Lohren, for the purpose of having a transfer of the examination to some other magistrate. The court denied the application the next day; the prisoner's attorney appearing and excepting to the ruling. On December 16 another affidavit of prejudice was filed, wherein a transfer was demanded under section 5260, R. L. 1905. This demand was denied. Then another affidavit of prejudice was filed, and upon application to the mayor he deemed the judge disqualified, and, under section 131 of the Revised Laws of 1905, designated J. P. Wagner, a justice of the peace of the county, to sit as judge. At the time and place appointed for the preliminary examination in the case of State v. Brandt it appears that Judge Lohren refused to abdicate in favor of Justice Wagner, and while hearing argument on the proposition from the prisoner's counsel the justice boisterously proclaimed himself judge of the municipal court and undertook to take the chair of Judge Lohren, whereupon the judge promptly tipped the justice out, and the latter, owing to a temporary disability, slid under the table and became profane and abusive, whereupon the judge fined him for contempt of court, and, failing to pay the fine, he was committed to the respondent's keeping, where he went to sleep; but his attorney was alert and petitioned for a writ of habeas corpus.

Many technical questions are raised by the parties; but we deem it unnecessary to consider them, because irregularities which do not go to the jurisdiction of the court issuing the commitment or to the validity of the judgment and commitment on the face thereof cannot be reached in this proceeding. State v. Bailey, 106 Minn. 138, 118 N. W. 676, 19 L.R.A.(N.S.) 775, 130 Am. St. 592; State v. Langum, 112 Minn. 121, 127 N. W. 465.

Conceding, without deciding, that filing an affidavit of prejudice under section 131, R. L. 1905, is authority for the mayor to designate a justice to take the place of the judge of the municipal court, we have a case where such judge refused to be ousted, and proceeded to hold court, notwithstanding the action of the mayor. Judge A. J. Lohren was still judge of the court. He undertook to act as

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such. If he, by the filing of the affidavit and the mayor's act, had lost jurisdiction to proceed against the prisoner, Brandt, the latter had his remedy. It was not for the justice to interrupt the procedure in the court presided over by Judge Lohren. It cannot be doubted that the latter had jurisdiction in the premises.

Were the judgment and commitment void? It is claimed the proceedings for contempt must in every particular conform to sections 3995 and 3996, R. L. 1905, wherein punishment for a contempt is limited to $20 fine or imprisonment not exceeding two days, and that a record must be transmitted to the clerk of the district court, and that the "warrant of the commitment shall set forth the particular circumstances of the offense, or it shall be void." The warrant of commitment, after the caption and direction to the proper officer and the keeper of the common jail, proceeds:

"Whereas, J. P. Wagner, on the 18th day of December, 1911, brought before A. J. Lohren, judge of the municipal court of the city of Waseca, in and for said county, during the sessions of said court, became boisterous and wanted to deprive the court of its peaceful proceedings, and fined $10 for contempt of court, which the said J. P. Wagner did not offer to pay and was sentenced to ten days' imprisonment in the county jail: Now, therefore, the said sheriff, you are commanded forthwith to convey and deliver into the custody of the said keeper the body of the said J. P. Wagner for a period of ten days, or until the fine of ten dollars ($10) shall have been paid, or until he shall be thence discharged by due course of law.

"Given under my hand this 18th day of December, A. D. 1911.

"A. J. Lohren,
"Municipal Judge."

In the records or docket of the court, in the case of State v. Brandt, we find this: "Dec. 18th, 1911. Court called at two o'clock, p. m. J. P. Wagner, justice of the peace, appeared and in a very boisterous manner declared that he was the municipal judge of the city of Waseca, and, refusing to keep quiet, the said J. P. Wagner was fined $10 for contempt of court. Failing to pay the

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fine, the said J. P. Wagner was sentenced to imprisonment in the county jail for a period of ten days, or until the fine is paid and commitment was duly issued." After the issuance of the writ of habeas corpus a more formal and complete order or judgment was entered.

It is true that the municipal court was limited as to the punishment of contempts to the same extent as justices of the peace. But it is manifest that the sentence was a fine, and the imprisonment was merely intended to enforce the payment thereof. There was no attempt made to impose a straight jail sentence. Therefore it is by no means clear that the court in any manner exceeded its jurisdiction, for a court has both the inherent and statutory power to enforce fines by confinement in the common jail for a proportionate reasonable time. State v. Peterson, 38 Minn. 143, 36 N. W. 443; City of Jordan v. Nicolin, 84 Minn. 367, 87 N. W. 915; sections 4031, 4542, 4776, 5242, R. L. 1905.

It is further urged that the procedure in contempt cases must be the same as in justice court. A justice court is not a court of record; hence the necessity of transmitting proceedings to such a court. The municipal court of the city of Waseca is a court of record. Wellcome v. Berkner, 108 Minn. 189, 121 N. W. 882. There is no apparent reason for holding that such a court should, as to the form of judgment and commitment, conform in all things to contempt procedure in justice court, or file the same with the clerk of the district court. In fact, municipal courts created under the present law are not limited in express terms in contempt matters to sections 3995 and 3996 of Revised Laws.

While the judgment and commitment are not in the most approved form, we are of opinion that there is a substantial compliance with the statute. Moreover, the defects complained of, such as failure to give Wagner an opportunity to be heard, inaccuracy in the order or judgment, omission to file the record with the clerk of the district court, that the judge signed the commitment as such, instead of as clerk, are not available in habeas corpus proceedings. The authorities relied on by relator are not in point or are for re-

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spondent. Especially is this true of Starry v. State, 115 Wis. 50, 90 N. W. 1014. Crites v. State, 74 Neb. 687, 105 N. W. 469, is an appeal from the judgment. State v. District Court, 124 Iowa, 187, 99 N. W. 712, is certiorari, and contempt proceedings are under statutes differing from ours.

The order of the court commissioner is reversed, and the prisoner, J. P. Wagner, is remanded to the custody of the respondent herein, M. McDonough.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

CHARLES O. BALDWIN and Another v. MATHILDA ZIEN and Another.[1]

February 16, 1912.

Nos. 17,439—(229).

Will — sale of realty.

A testator by his will gave to his wife a legacy of $5,000, a devise of a leasehold interest for life, and the remainder thereof to his brother, and made a number of other legacies. The district court, on appeal from the probate court, made its order directing a sale of the real estate, and the order in which it should be sold, and the application of the rents from the leasehold estate. Will construed, and *held*, that it was not error to omit from the sale the homestead, nor to include in the sale land contiguous thereto, but not a part of it, nor to direct a sale of the remainder of the leasehold estate before the sale of the life estate, nor to direct that advances made to the widow and taxes paid by the executors on the leasehold estate be repaid out of the rents of the leasehold estate.

Charles O. Baldwin and H. M. Levy, two of the three executors of the estate of Jacob D. Zien, deceased, petitioned the probate court

[1] Reported in 134 N. W. 498.

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for St. Louis county for its order determining what disposition they should make of the money in their rent fund, and that they be licensed to sell the lands belonging to the estate for the payment of debts, expenses and legacies. The substance of the will is stated in the opinion.

Isaac Zien, the third executor, in his separate petition, prayed that, instead of licensing the sale of the real estate, the court direct the executors to sell all the personal property; that they transfer from the so-called "rent fund" to the "general fund" what they have paid from the general fund upon the indebtedness secured by mortgage upon the leasehold property; that they apply all proceeds of the personal property on the debts and expenses of administration; that, if the court makes any order for the sale of any real estate, it direct such sale to be made in the following order: (1) All of the real estate except that devised to either the widow or to petitioner or to his children; (2) the real estate devised to Mathilda Zien in paragraph 5 of the will, and (3) the leasehold estate.

As legatee and devisee under the will, Isaac Zien filed written objections to any order authorizing a sale of the real estate devised and bequeathed to him in paragraph 3 of the will, and to any order directing the payment of any portion of the rent fund to Mathilda Zien, as legatee and devisee under paragraph 3, until all debts, expenses of administration, and the legacies mentioned in paragraph 2 had been paid.

Mathilda Zien, the widow, answered the petition of the executors and objected to the sale of any real estate or personal property devised or bequeathed to her under the will, for the purpose of paying debts, expenses or legacies, until all other property, real or personal, owned by the testator at the time of his death was sold; alleged that all rents collected from the leasehold property, less actual disbursements for maintaining it, belonged to petitioner under the will, and no part thereof should be used for the payment of debts, expenses or legacies, unless the property of testator other than that bequeathed or devised to her be first sold; and objected to any deduction of

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taxes for the year 1908 upon the premises, for the reason that the taxes were due and owing at the time of the death of the testator.

The matter was heard by the judge of probate, who made findings and licensed the representatives of the estate to sell the real estate of deceased in the order mentioned in the findings. From the order of the probate court, in so far as it ordered and directed the sale of the interest devised and bequeathed to said Isaac Zien in and to the leasehold estate, the latter appealed to the district court for that county. The appeal was heard by Dibell, J., who made findings of fact and conclusions of law as stated in the opinion (page 183).

From the judgment and order remanding the proceedings to the probate court with directions to enter an order licensing the sale of so much of the real estate as might be necessary to pay the costs of administration, the debts and the legacy of $5,000 to Mathilda Zien in paragraph 2 of the will, in so far as the judgment and order directed a sale of the remainder interest of Isaac Zien in the leasehold estate before the life estate of Mathilda Zien in the leasehold estate, and in so far as it directed a sale of said remainder interest of Isaac Zien before the sale of the homestead bequeathed to Mathilda Zien, Isaac Zien appealed.

From the judgment and order remanding the proceedings to the probate court with directions to enter an order licensing the sale of so much of the real estate as might be necessary to pay the costs of administration, the debts and the legacy of $5,000 to Mathilda Zien, in so far as the judgment and order directed the sale of the westerly $21^2/_7$ feet of the easterly one half of a certain lot constituting part of the homestead of decedent, before the sale of the remainder interest of Isaac Zien in the leasehold estate described in the findings; and in so far as the findings, judgment and order adjudged that the taxes for 1908 of the leasehold estate were a charge against the life interest of Mathilda Zien in the leasehold estate; and in so far as the finding, judgment and order adjudging that the $9,600 paid by the executors to Mathilda Zien must be treated as an advancement

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to her, and must be repaid by the executors out of the funds in their hands belonging to her, Mathilda Zien appealed.

Affirmed on both appeals.

Washburn, Bailey & Mitchell, for appellant Isaac Zien.

Crassweller, Crassweller & Blu, for appellant Mathilda Zien.

Baldwin & Baldwin and *J. T. Pearson,* for the executors of the estate.

START, C. J.

Jacob D. Zien died testate April 9, 1909, and his will was duly admitted to probate by the probate court of the county of St. Louis. His principal legatees and devisees were his widow, Mathilda Zien, and his brother, Isaac Zien. It became necessary in the course of the settlement of the estate, for the purpose of paying debts and legacies, to sell real estate which had been devised by the will. Accordingly the probate court made its order licensing the executors to sell such real estate and designating the order in which it should be sold. Isaac Zien appealed from the order to the district court of the county of St. Louis.

Upon a hearing of the matter in that court, an order was made remanding the case to the probate court, with directions to enter an order licensing the sale of so much of the real estate as might be necessary to pay the costs of administration, the debts, and a legacy of $5,000 to Mathilda Zien, and also directing the order in which the several parcels of real estate should be sold. Isaac Zien and Mathilda Zien severally appealed from the order.

The principal question raised by the cross-appeals relates to the order in which the real estate should be sold. A solution of this question depends upon the construction of the will, which contained twenty-five paragraphs, consecutively numbered. The here material provisions of the will, with the paragraph number of each, are to the effect following:

1. I desire and request that all my just debts be paid.

2. I give, devise, and bequeath to my wife, Mathilda Zien, $5,000, to be paid before the payment of any other bequests.

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3. All of my interest, being a leasehold interest, in the south one hundred feet of lots 17 and 19 on West First street, Duluth, I give, devise, and bequeath to my wife, Mathilda Zien, for the period of her natural life, and upon her death the remainder to my brother Isaac Zien, if living, but, if not, to his children.

4. I desire and request my executors to erect suitable monuments over the graves of my father and mother, each to be of the cost of $100, and to erect upon my burial lot a vault to cost $2,500.

5. I give, devise, and bequeath to my wife, Mathilda Zien, my homestead in the city of Duluth, together with the land contiguous thereto which I shall own at the time of my death.

6. I give, devise, and bequeath my household furniture, horses, and carriages to my wife.

7. I give, devise, and bequeath my diamonds and jewelry to the children of my brother Isaac Zien.

8. I give, devise, and bequeath to the children of my brother Louis Zien my wearing apparel.

9. I direct my executors to invest $10,000 for the benefit of my brother Louis Zien.

10. I direct that, if my brother Louis Zien does not survive me, the $10,000 be invested for the benefit of his children.

11 to 20. (These paragraphs contain specific bequests to various persons and institutions.)

21. "It is my will and it is the intention hereof that out of my estate my said executors shall comply with all the requests and pay all the bequests and perform all the requirements contained in the paragraphs hereof numbered from one (1) to ten (10), both inclusive, in the order therein set forth, and shall provide for the bequests and payments in said ten paragraphs provided for in full before any other bequest is paid and before any money is appropriated for any other purpose herein mentioned."

24. "I hereby give, devise and bequeath to my brother, Isaac Zien, the indebtedness of $21,996.00 and interest, which he owes me according to the terms of eighteen promissory notes, all dated January 8th, 1909, and aggregating $21,996.00; and it is my will,

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notwithstanding anything else hereinbefore mentioned, that at my death said indebtedness shall be considered canceled, and my said executors are authorized and directed to mark said notes canceled and deliver them up to said Isaac Zien, who shall upon my death be discharged from all liability upon said notes."

The trial court made the will a part of its findings, and found that the debts proved against the estate of the testator amounted to $30,750.46, of which the executors had paid $16,572.12, leaving unpaid a balance, including interest, of $15,908.78; that the expenses of administration unpaid were $5,000; and, further, that it was necessary to sell certain or all of the real estate to pay the expenses of the administration, the debts, and the legacies provided for in the will.

The trial court also found that the leasehold estate devised by the will to the widow for life and remainder to the brother Isaac was created by a lease for fifty years from January 10, 1907; that in and by the terms of the lease the lessee was required to pay all taxes and a yearly rental of $2,000; that the taxes for the year 1908 amounted to $1,259.64, which were chargeable to the widow, and had been paid by the executors; that they had received as rents from the leasehold estate the net sum of $18,414.80, which sum, plus $710.56 which had been paid from the rents for the benefit of the estate, will belong to the widow upon final distribution, unless it be necessary to sell her interest in the leasehold estate, less $9,600 advanced to her by order of the probate court; that such advancement must be repaid out of funds in the hands of the executors belonging to the widow.

As a conclusion of law the trial court ordered and directed that five certain parcels of land, described in its order, and which were not specifically devised by the will, be sold before any of the remaining real estate; that the land contiguous to the homestead, but no part thereof, be sold before any part of the leasehold estate; and that the remainder interest of Isaac Zien in the leasehold estate be sold before the life estate of the widow therein.

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It appears from the record that the widow assented to the will and elected to take thereunder.

The appeal and assignments of error on the part of Isaac Zien raise the questions whether the court erred in not directing a sale of the homestead, as well as the land contiguous thereto, before the sale of his remainder interest in the leasehold estate, and whether it was error to direct a sale of his interest therein before a sale of the interest of the widow therein. Those on the part of the widow raise the question whether it was error to direct a sale of the land which was contiguous to the homestead, or in holding that the advancement of $9,600 should be repaid from the fund in the hands of the executors belonging to her, or in charging her interest therein with the taxes.

The several questions raised by the respective appellants are so connected and dependent for their solution upon a construction of the will that it is not practicable to discuss and decide them separately.

The intention of the testator as expressed by his will must prevail. It is apparent from the will and the findings of the trial court that the testator overestimated the value of his estate, and that none of the money legacies can be paid, except the one to his widow. That a contingency might arise which would prevent the payment in full of all the bequests was anticipated by the testator, and he attempted to make provision for it by paragraph 21 of his will, in which he directed the payment of all *bequests* contained in paragraphs 1 to 10 thereof in the order therein set forth. In a strictly modern legal sense the words "bequest" and "bequeath" are the appropriate terms for making a gift by will of personalty, and the words "devise" and "devise" for a gift of realty. But it is evident that the testator used the words in their popular sense, and as applicable alike to a gift by will of property of any kind; hence the word "bequests" in paragraph 21 cannot be limited to gifts of personalty.

It does not, however, follow from this conclusion that it was the intention of the testator that the homestead and the household furniture given to the widow by paragraphs 5 and 6 should be sold to

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pay debts and legacies, which would be the necessary result if the construction of the will contended for by the appellant Isaac Zien be accepted. The purpose of the testator to provide a home for his widow and a certain income to maintain herself during her life is obvious on the face of the will. Equally clear is the purpose of the testator to deal liberally, subject to the provisions made for his widow, with his brother Isaac. The direction in paragraph 21 to comply with the requests and pay the bequests in the order set forth in paragraphs 1 to 10 must be construed so as to give effect to the manifest intention of the testator to provide a home and income for his widow. Her assent to the will and election to take thereunder must also be construed with reference to such intention of the testator. So construing them, we hold that the will does not subject the homestead for sale for the payment of debts and legacies before the sale of the remainder interest of Isaac Zien in the leasehold estate; for a contrary intention is manifested in the will.

The testator by paragraph 3 of his will did not treat the leasehold estate as an entirety, but divided it, by giving to his widow the use thereof for her life and the remainder of the term to his brother. This remainder has a very substantial and easily ascertainable value; for if the age of the widow is, as seems to be conceded, fifty years, her expectation of life is less than one-half of the time limit of the leasehold estate, and there is neither reason nor necessity for selling the leasehold estate as an entirety. It follows that the trial court did not err in ordering the remainder interest to be sold before the life estate, and the order must be affirmed on the appeal of Isaac Zien.

This brings us to a consideration of the alleged errors urged on behalf of the widow. Her first claim is that the trial court erred in directing a sale of the land contiguous to the homestead, because such legacy falls within the general rule that a legacy given in lieu of dower does not abate, but has priority over general legacies which are mere bounties. The presumption, however, unless the contrary appears from the will, is that a legacy is intended as a bounty, and not as a purchase or in lieu of statutory provisions in the nature

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of dower. In re Gotzian, 34 Minn. 159, 24 N. W. 920, 57 Am. Rep. 43; McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251.

We are of the opinion that it clearly appears from the will, when its whole scheme is considered, especially the provision of paragraph 21 that any land contiguous to the homestead *which the testator "shall own at the time of his death,"* that it was the intention of the testator to subject the land in question to sale for the payment of debts and legacies in the order directed by the trial court.

The second and third alleged errors urged are without merit. The trial court correctly treated the amount paid to the widow by order of the probate court as an advancement, to be repaid out of the rents of the leasehold estate. Blakeman v. Blakeman, 64 Minn. 315, 67 N. W. 69.

The taxes were due at the time of the testator's death, and as between the life tenant and the remainderman the life estate must carry the taxes. Therefore the order directing their payment out of the income from the life estate was right.

Order affirmed on both appeals.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

STATE v. BRIDGEMAN & RUSSELL COMPANY.[1]

February 16, 1912.

Nos. 17,464—(237).

Constitution — classification.

Classification for purposes of legislation is a matter of legislative policy and discretion, and it is only when a classification is manifestly arbitrary that the courts will declare a statute unconstitutional.

Same — act constitutional.

Chapter 468, Laws 1909, an act to prevent unlawful discrimination in

[1] Reported in 134 N. W. 496.

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the sale of milk, cream, and butter fat, does not violate the equality provision of either the state or Federal Constitution, or the prohibitions of the state Constitution as to special legislation. The classification of the act is not an arbitrary one, and the act is constitutional.

Title of act.

It is sufficient if the title of a statute is fairly suggestive of its subject, and every fair doubt should be resolved in favor of its sufficiency. The title of the statute referred to is sufficient.

Case certified from district court for Pine county. Defendant's demurrer to an indictment against it was overruled, Stolberg, J. Affirmed.

Lyndon A. Smith, Attorney General, *Alexander L. Janes,* Assistant Attorney General, and *William H. Lamson,* County Attorney, for the State.

Baldwin & Baldwin and *J. T. Pearson,* for defendant.

START, C. J.

The defendant is a corporation organized under the laws of the state of Minnesota, with its principal place of business at Duluth. It is engaged in the business of buying milk, cream, and butter fat for the purpose of manufacture. On April 13, 1911, an indictment was duly returned to the district court of the county of Pine, charging the defendant with a violation of the provisions of chapter 468, p. 564, Laws 1909 [R. L. Supp. 1909, § 5169—1]. It demurred to the indictment, on the ground that the facts alleged therein did not constitute a public offense, thereby raising the question of the constitutionality of the statute. The demurrer was overruled, and pursuant to R. L. 1905, § 5409, the trial court certified to this court the question of the constitutionality of the statute, which is in these words:

"An act to prevent unlawful discrimination in the sale of milk, cream, butter fat and to provide a punishment for the same.

"Be it enacted by the Legislature of the state of Minnesota:

"Unfair Discrimination in Sale of Milk, Cream, etc., Prohibited.

"Section 1. Any person, firm, copartnership or corporation en-

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gaged in the business of buying milk, cream or butter fat for the purpose of manufacture who shall, with the intention of creating a monopoly or destroying the business of a competitor, discriminate between different sections, localities, communities or cities of this state by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, copartnership or corporation in another locality after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture shall be deemed guilty of unfair discrimination and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment in the county jail not to exceed six months."

The facts alleged in the indictment bring the case within the terms of this statute.

It is the contention of the defendant that this act violates the equality clause of the fourteenth amendment of the Federal Constitution, the equality clause, section 2, article 1, and sections 33 and 34, article 4, prohibiting special legislation, of our state Constitution. The question in its last analysis is whether the classification made by the act is a permissible or an arbitrary one, for the principles of classification are applicable alike to class and special legislation. A law, if the classification adopted be a proper one, is general, uniform, and equal which operates alike upon all subjects within the class. The classification, however, cannot be arbitrary, but must be based upon some reason suggested by such difference in the situation and circumstances of the subjects classified as naturally to suggest the necessity, or at least the propriety, of different legislation in respect thereto. Classification for purposes of legislation is a matter of legislative policy and discretion, and it is only when a classification is manifestly arbitrary that the courts will declare a statute unconstitutional. If there be any fair doubt in any case, it must be resolved in favor of the validity of the classification.

In construing the constitutionality of a statute, courts will take judicial notice of all facts relevant to the question; that is, in this

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case, relevant to the classification. Judicial notice does not depend on the actual knowledge of the judges, and they may refresh their recollections by resorting to any means they may deem safe and proper. Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; State v. Cooley, 56 Minn. 540, 58 N. W. 150; State v. Stearns, 72 Minn. 200, 75 N. W. 210; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. 681; Murray v. Board of Co. Commrs. of Ramsey County, 81 Minn. 359, 84 N. W. 103, 51 L.R.A. 828, 83 Am. St. 379; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. 571; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327; State v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State v. Chicago, M. & St. P. Ry. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494.

The question whether the classification in this case is clearly arbitrary is to be determined by the application to it of the general and well-settled principles stated. The classification in the act is limited to those engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture, with the intention of creating a monopoly or destroying the business of a competitor. This by necessary implication excludes those engaged in the business of buying such commodities for any purpose other than for manufacture. The reasons urged in support of the claim that this classification is arbitrary are concisely stated by counsel for the defendant in these words:

"There is nothing peculiar about the common articles, milk, cream, and butter fat, either in the things themselves or in the manner in which they are 'put upon the market,' to justify a classification for them; nor is there any reason for a subdivision of such an arbitrary selection into those who buy and those who sell, and, still further, there is not the slightest excuse for a subdivision separating those who buy for a certain purpose, in itself lawful, from those who buy for another purpose, equally as lawful."

If this be true, then the classification is an arbitrary one, and the act unconstitutional. There is, however, a strong presumption that there were reasons, arising from the volume and methods of the bus-

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iness of purchasing such commodities for manufacture, its extent, and the motives and facilities offered for creating a monopoly, which justified the legislature in making the classification it did. Such presumption must prevail, and the classification held to be a permissible one, unless it is manifest that there could have been no fair reasons therefor. Our consideration of the subject has led us to the conclusion that the business of buying milk, cream, and butter fat for the purpose of manufacture, when carried on by parties controlling ample capital, with large central plants and local purchasing points extending over wide territory, affords special facilities and motives for the creation of monopolies by the temporary maintenance of artificial prices at competitive local points, and, further, that there is in this respect a substantial distinction between the purchase of milk, cream, and butter fat for manufacture and their purchase for resale or consumption. The business of buying such commodities for resale or consumption is not one easily susceptible to monopolistic control. This distinction is clearly drawn in the opinion of the court in the case of State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, sustaining the constitutionality of a statute which, so far as it related to the buying of milk, cream or butter fat for manufacture, was similar to our own. The court in the case cited said:

"A multitude of people buy milk and cream for immediate consumption. Comparatively few buy milk and cream 'for the purpose of manufacture.' To the multitude who buy for immediate consumption, a monopoly would be quite impossible, and its attempt quite absurd. But those who buy milk and cream 'for the purpose of manufacture' sustain a distinctly different relation to the trade and to the community in which they operate. The magnitude of their operations is limited only by the magnitude of their resources. The motive to monopolize is present, as well as the ability to reap its fruits when acquired. In the nature of the case, the discriminations which are condemned in the legislative act are practicable as a practice only to those who engage in the business on a large scale.

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We are impressed, therefore, that the classification adopted is one which arises quite naturally, and that it rests upon a substantial and practical distinction."

The payment relatively of a higher price for milk, cream, and butter fat in one locality than in another is not forbidden by our statute; for it is only when such discrimination is made with the intention of creating a monopoly or destroying the business of a competitor that the act is forbidden. We are unable to distinguish, upon principle, this case from State v. Standard Oil Co. supra; and, following that case, we hold that the classification in the act in question is not merely an arbitrary one, but a permissible one, and that the act is constitutional.

The defendant makes, in its reply brief, and for the first time, the claim that the subject of the act is not expressed in its title. The argument in support of the claim is this: "The act in question is 'An act to prevent unlawful discrimination in the sale of milk, cream, butter fat and to provide a punishment for the same.' Nothing whatever is said in the title of this act about the purchase of, or business of, buying milk, cream, or butter fat for the purpose of manufacture, while the substance of the act provides and applies solely and only to those engaged in the business of *buying* milk, cream, or butter fat. Neither the business of selling nor the word 'sale' is even suggested in the substance of the act."

It is sufficient if the title of an act is fairly suggestive of its subject, and every fair doubt should be resolved in favor of the sufficiency of the title. While the title of the act in question is not a model one, yet it is obviously sufficient within the rule stated, for it is fairly suggestive of the subject of the act. It is true that the subject expressed in the title is the prevention of discrimination in the sale of the commodities named, and that the subject dealt with in the body of the act is the prevention of discrimination in the purchase of the same commodities. But purchase and sale are correlative terms, and there can be no sale without a purchase; hence, if

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discrimination in the purchase of an article is prevented, there can be none in its sale.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

STATE ex rel. HENRY A. HILDEBRANDT v. MICHAEL W. FITZGERALD.[1]

February 16, 1912.

Nos. 17,488—(242).

Registration of mortgages.

Chapter 328, Laws 1907, construed, and *held*, that it was the intention to constitute all mortgages upon real estate a class for the purpose of taxation, and that a mortgage given to secure an indebtedness of $50 or less is within the operation of the law, and taxable thereunder.

Act constitutional.

As so construed, the law is constitutional.

Upon petition to the district court for Ramsey county by Henry A. Hildebrandt, the court granted its writ of mandamus directing Michael W. Fitzgerald, as registrar of titles in and for Ramsey county, to show cause why he had not received, filed and registered the mortgage deed specified in the writ, as required by law. From the judgment entered upon the order sustaining relator's demurrer to the answer, Olin B. Lewis, J., respondent appealed. Reversed.

Hermon W. Phillips, for relator.

William G. White, for respondent.

BUNN, J.

The relator presented to the district court for Ramsey county a

[1] Reported in 134 N. W. 728.

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petition for a writ of mandamus to compel respondent, as registrar of titles of said county, to register a mortgage made by the Midway Realty Company to relator October 24, 1911, to secure an indebtedness of $50. The petition alleged that the title to the land mortgaged was registered under the Torrens act, that the mortgage was tendered to respondent, as registrar of titles, for registration, together with the fees for filing and registering the same, and that respondent refused to file or register such mortgage. Upon this petition an alternative writ of mandamus was issued as prayed.

Respondent answered, admitting the allegations of the petition, but alleging as his reason for refusing to register the mortgage that the registration tax thereon provided by chapter 328, p. 448, Laws 1907 [R. L. Supp. 1909, §§ 1038—25 to 1038—33], had not been paid; that the mortgage had not been presented to the county treasurer for the payment of such tax, or for the placing on the mortgage of the indorsement of the county treasurer that the mortgage is exempt from such tax; and that neither the indorsement that the tax had been paid nor that the mortgage was exempt was ever placed upon the mortgage.

To this answer relator demurred. The trial court sustained this demurrer, and judgment was entered that a peremptory writ of mandamus issue. From this judgment, respondent appealed to this court.

The question for our decision is this: Is a mortgage for $50 or less taxable under chapter 328, p. 448, Laws of 1907?

The decision of the trial court that the mortgage in question was not taxable under this law was based upon the language of section 2 of the act, reading as follows: "A tax of fifty cents is hereby imposed upon each one hundred dollars, or major fraction thereof, of the principal debt or obligation which is or in any contingency may be secured by any mortgage of real property situate within the state which mortgage is recorded or registered on or after April 30, 1907." It is not only admitted by both counsel, but asserted, that if the construction placed on the law by the trial court is correct, the law is unconstitutional, because there is no basis for a classification of

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mortgages for the purposes of taxation according to the amount of the debt secured thereby. Counsel for relator insists that this construction is necessary, and that the law is and should be declared unconstitutional; while counsel for the respondent in the court below urges the unconstitutionality of the law, if the trial court's construction is upheld, as an argument for a construction of the law which would make it valid.

This law was held constitutional after exhaustive arguments in Mutual Benefit Ins. Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572. The chief attack made against the law in that case was that it provided for a classification that was improper and illegal under the amendment to the Constitution adopted in 1906 providing that "taxes shall be uniform upon the same class of subjects." This court held that the law declared that "mortgages upon real estate shall constitute a class," and that such a classification was a reasonable one, suggested by essential differences of nature, situation, or circumstances, between a mortgage on real estate, and notes, bonds, or unsecured debts. The contention in that case that the tax was not uniform upon all subjects of the same class was held unfounded. Justice Elliott said:

"Under this provision all property belonging to the same class must be treated alike. There must be no discrimination between the subjects of that class. The same means and methods must be applied impartially to all the constituent elements of the class. The amount of the debt secured by the lien furnishes the normal and natural standard for measuring the amount of tax which shall be paid when a mortgage is recorded under this statute."

While it does not appear to have been urged in the above case that the law did not apply to mortgages securing debts of $50 or less, the decision clearly proceeds upon the basis that the act provides a uniform tax upon all mortgages, and therefore that the constitutional requirement that "all taxes shall be uniform upon the same class of subjects" was satisfied. It is to us quite apparent that this constitutional requirement is not satisfied if any mortgages are omitted from the operation of the act. It was again held that chap-

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ter 328, p. 448, Laws 1907, was constitutional in State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851, though the precise point here urged was not there presented. While these decisions do not necessarily preclude our declaring the act invalid on a ground not argued in those cases, yet we should be very reluctant to reach a result opposed to the results reached in such cases, both of which were thoroughly argued and considered. There can be no doubt of the beneficial character of the act. Its objects are well stated in the Martin County case. For these reasons it would be extremely unfortunate if we were now obliged to hold the law unconstitutional.

We approach the construction of the act in question under the guidance of certain familiar rules. In the first place, the intent of the legislature is to be ascertained from the language of the entire act, read in the light of the object evidently in view; that is, doing away with the inequality and injustice that often resulted under the old system. Secondly, the elementary rule that every presumption is in favor of the constitutionality of an act of the legislature, and that the court should not declare it unconstitutional, except when satisfied after the most careful consideration that it conflicts with some provision of the state or Federal Constitution. Thirdly, the rule, peculiarly applicable here, that if the act is reasonably susceptible of two different constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be adopted.

Applying these rules to the construction of chapter 328 and for the present leaving section 2 out of consideration, it is plainly apparent from the language of the entire act that the legislature intended to constitute mortgages on real estate a class for the purposes of taxation, and did not intend to exclude from the class any subject that properly came within it; that is, did not intend to exclude mortgages given to secure an indebtedness of $50 or less. No reason has been or can be suggested for omitting such mortgages from the operation of the act, and no language used either in the

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title of the act or in any provision thereof, unless it be in section 2, evidences any intention whatever to omit such mortgages.

The title is: "An act to provide for the taxation of mortgages of real property." By section 1 the word "mortgages," as used in the act, is defined: It "shall mean any instrument creating or evidencing a lien of any kind" upon real estate. Section 3 provides that "all mortgages upon which such tax has been paid" shall be exempt from all other taxes. Section 4 provides that, in case of mortgages made to a mortgagee in trust to secure the payment of bonds or other obligations to be issued thereafter, a statement may be included therein of the obligations issued and to be issued, and that the tax shall be computed upon the amount so stated. Section 5 provides how the tax shall be paid, that the treasurer's receipt shall be indorsed on the mortgage, or, if the mortgage is exempt from taxation, that such fact shall be so indorsed thereon. Section 6 provides that, when the real estate described in the mortgage is not taxed by direct tax upon the assessed valuation thereof, the registration tax shall be paid to the State Treasurer; but as to all real property described in any mortgage taxed upon an assessed valuation the registry tax shall be paid as provided in section 5 hereof." Section 7 provides that *no such mortgage* shall be recorded after April 30, 1907, unless said tax shall have been paid. Section 8 provides that "all mortgages of real estate recorded or registered prior to April 30, 1907, shall be taxable as provided by law under the provisions of law relating thereto prior to the enactment hereof: Provided, that the holder of any such mortgage may pay * * * the tax herein prescribed. * * * Thereafter such mortgage debt shall not be otherwise taxable."

The provisions quoted above are sufficient to indicate clearly an intention to impose a registration tax upon all mortgages. All that is lacking to make the act complete is the amount of the tax, and the measure by which the amount to be paid on each mortgage shall be ascertained. Section 2 was intended to fix the rate and the measure. The language of that section is unfortunate: "A tax of fifty cents is hereby imposed *upon each one hundred dollars, or*

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major fraction thereof, of the principal debt or obligation which is, or in any contingency may be, secured by *any* mortgage of real property within the state." As we held in the Martin County case, supra, the tax is not upon the indebtedness, but upon the security. While the language of the section is that "a tax of fifty cents is hereby imposed upon each one hundred dollars" of the indebtedness, it is still true that the tax is not imposed upon the indebtedness at all, but is imposed upon the security or lien given by the mortgage. The amount of the debt is used to determine the value for taxation of the security or lien, and this is clearly proper. The language of section 2, therefore, must be considered as an attempt to fix the rate of taxation and the method for applying the rate to a particular mortgage.

It would have saved trouble had the legislature simply fixed the rate, and left the computation to the officials upon whom the duty of collecting the tax was imposed; but it was apparently thought that it would economize labor or save making change to establish a unit of $100 as a measure or yardstick. In making the unit "one hundred dollars, or major fraction thereof," the lawmakers apparently did not have in mind that mortgages might be given to secure $50 or less, and thus that the measure provided could not be used. But as there was no reason whatever for not taxing these small mortgages, as well as larger ones, as the entire act indicates an intention to tax *all* mortgages, and especially as it would otherwise be unconstitutional, we think that the language of section 2 is reasonably susceptible of the construction that it does not exclude from the operation of the act mortgages of $50 or less, and that we should so construe the law in order to avoid declaring it unconstitutional. That it would be unconstitutional if construed as it was by the trial court, and that it is constitutional as we construe it, is, we think, clear.

A mortgage of $50 or less is either taxable under the law or not within its operation at all. If not within its operation, the security or lien is not taxed at all, though the indebtedness is subject to a tax of three mills as a credit under chapter 285, p. 397, Laws 1911.

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Such a result would be taking from the class formed by chapter 328, p. 448, Laws 1907, a subject that properly belongs there, and inserting it in the class formed by chapter 285, p. 397, Laws 1911, of which it is clearly not a proper subject, because it is a debt secured by a mortgage lien on real estate. This would endanger the constitutionality of both laws.

It may be suggested that the rule "de minimis non curat lex" could be applied to save the law. But the trouble is, not a lack of substantial equality of taxation, but a classification for which no basis can be suggested. That the omission from a class of subjects that clearly belong to such class would make the law invalid is plain. In justice to the trial court it should be stated that the effect of the construction of the law on its constitutionality was not argued or considered in that court, and we do not intimate that the construction adopted by the trial court would not be justified, if such construction did not make the law violate the Constitution of this state. We hold merely that the act is fairly susceptible of the construction we have given it, and that, as so construed, it is a valid law. The classification is a proper one, if, as we hold, *all* mortgages are included in the class, and the adoption of the unit system of ascertaining the amount of the tax on each mortgage, though it may result in slight inequality in a few cases, brings substantial equality and does not render the law void. This unit or measure can be legally used when the amount secured by the mortgage is more than $50, but is inapplicable when it is attempted to apply it to a mortgage of $50 or less, because the measure is too large.

This leaves only the question of what tax a mortgage of $50 or less is to pay. We think that the act shows an intent to fix a rate of one-half of one per cent applicable to all mortgages; that the unit or measure may be used, where it can be applied; but that, as to mortgages that are too small to be measured by the unit provided, the rate of one-half of one per cent. was intended to apply. This seems more logical than holding that every mortgage of $50 or under shall pay a tax of fifty cents. Such a holding would be inconsistent with saying, as we have said, that the legislature did

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not have in mind that such small mortgages would be given, and for that reason adopted a measure that could not be used. It would be saying that the legislature intended to impose a tax of fifty cents on an indebtedness that was a *minor* fraction of $100 in spite of the language used, and in opposition to the clearly sound conclusion that it was not intended to impose a tax on the indebtedness at all.

We hold that a mortgage securing an indebtedness of $50 or less is within the operation of the law in question, and taxable, and that, as so construed, the law is constitutional.

Judgment reversed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

JOSEPHA M. STEELE v. RED RIVER LUMBER COMPANY.[1]

April 12, 1912.

Nos. 17,421—(35).[2]

Injury to servant — contributory negligence.

Evidence considered in this a personal injury action, and *held*, that the trial court rightly directed a verdict for the defendant, on the ground that the evidence conclusively established the contributory negligence of the plaintiff's intestate.

Action in the district court for Hubbard county by the administratrix of the estate of James M. Steele, deceased, to recover $5,000 for the death of her intestate. After the decision upon the former appeal, 110 Minn. 219, 124 N. W. 978, the case was tried before McClenahan, J., who at the close of the testimony granted defendant's motion for a directed verdict in its favor. From an order denying plaintiff's motion for a new trial, she appealed. Affirmed.

[1] Reported in 135 N. W. 389. [2] April, 1912, term calendar.

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Donohue & Stephens and *Latham, Pidgeon & Larson,* for appellant.

R. B. Brower, for respondent.

START, C. J.

On December 6, 1907, the plaintiff's intestate was killed as the result of a collision between the railway train of defendant, which was being pushed by an engine, and a hand car propelling a push car, coming from the opposite direction. This action was brought in the district court of the county of Hubbard to recover damages for the death of the intestate, on the ground that it was caused by the negligence of defendant, in that its section crew propelling the hand car failed to put out flag signals before attempting to round a curve in the track, as was their duty to do.

The defense was a denial of negligence on the part of the defendant, and contributory negligence of the intestate, who was in charge of the train as conductor, because he failed properly to control his train, and that he violated the rule of the defendant which required him to keep a trainman in a conspicuous position on the front of the leading car in the train when it was backing.

The first trial of the issues resulted in a verdict for the plaintiff, but upon appeal to this court the verdict was set aside and a new trial granted. See Steele v. Red River Lumber Co. 110 Minn. 219, 124 N. W. 978, to which reference is here made for a fuller statement of the facts. On the second trial of the cause the court, at the close of the plaintiff's case, directed a verdict for the defendant on its motion. The plaintiff appealed from an order denying her motion for a new trial.

The evidence as to the defendant's negligence and as to the intestate's failure to comply with the rule was substantially the same on the second trial as it was on the first. We held, upon a consideration of the evidence on the former appeal, that the evidence was sufficient to justify a finding that the defendant was guilty of negligence as alleged, and that it conclusively appeared from such evidence that the intestate was guilty of negligence in violating the

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rule which required that, when a train was being pushed by an engine, a trainman should be stationed in a conspicuous position on the leading car to perceive the first signs of danger and signal the engineer. A consideration of the evidence on this appeal necessarily leads to the same conclusion.

It is true, as claimed by the appellant, that contributory negligence on the part of an injured party, which will defeat a recovery by him or his personal representatives, consists of two essential elements. He must not only have been negligent, but his negligence must have contributed proximately to his injury. Fitzgerald v. International Flax Twine Co. 104 Minn. 138, 116 N. W. 475.

It is the contention of the appellant, in this connection, that the evidence made the question whether the intestate's negligence contributed proximately to the collision and to his death one of fact for the jury. This is the pivotal question on this appeal. It is urged by the appellant that the collision occurred near the end of a curve in the track around the base of a hill, which would for a space of about two hundred feet completely obstruct the view of a trainman standing upon the top of the box car, the leading one in the train, so that it would be impossible for him to signal the engineer and thereby prevent the collision or diminish the intensity of the impact.

The rule, which was violated, was intended to prevent a collision between the train being pushed and any obstruction on the track. Its observance would directly tend to prevent a collision, and its violation would naturally tend to result in disaster. It conclusively appears that the conductor controlled absolutely the train and the manner in which it should be moved. He must have been familiar with the track and its curves. He was confronted by no emergency, but deliberately omitted to comply with the rule or take any precautions to prevent the collision. We have attentively considered the evidence, and find that it conclusively shows, not only that the intestate was negligent, but also that such negligence contributed proximately to the collision and to his death. We regret this result, but the record leaves us no choice.

Order affirmed.

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LEO J. CLARK v. THORPE BROTHERS.[1]

April 12, 1912.

Nos. 17,493—(25).

Findings sustained by evidence.

Action to recover earnest money paid on an executory contract for the purchase of real estate, on the ground that the plaintiff was induced to enter into the contract by the alleged fraudulent representation of the defendant as to the amount of the taxes per year on the property. *Held:*

1. If findings of fact are so uncertain that it is impossible to tell, by reference to the pleadings, what the court intended to find, they are not sufficient to sustain a judgment; but if such intention can be ascertained by reference to the pleadings, the objection that the findings are not sufficiently specific cannot be raised for the first time on appeal, the remedy being a motion to make them more specific.

2. Findings of fact herein, when construed with reference to the pleadings, are sufficient to sustain the conclusion of law that the plaintiff is entitled to judgment for the amount paid on the contract.

3. The defendant cannot avoid the consequences of its fraudulent representation merely because the plaintiff might have consulted the official tax records. The findings of fact are sustained by the evidence. The court did not err in its rulings as to the admission of evidence.

Action in the municipal court of Minneapolis to recover $100 paid as earnest money on an executory contract for the purchase and sale of certain real estate. The case was tried before Montgomery, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for the sum demanded. From an order denying its motion to amend the conclusions of law and for a new trial, defendant appealed. Affirmed.

Edward T. Teitsworth, for appellant.

George Harold Smith, for respondent.

[1] Reported in 135 N. W. 387.

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START, C. J.

This action was brought in the municipal court of the city of Minneapolis to recover $100 paid by the plaintiff to the defendant, a corporation, as earnest money on an executory contract for the purchase and sale of certain real estate. The alleged ground for recovery was that he was induced to enter into the contract by the fraud of the defendant.

The here material allegations of the complaint are to the effect that the defendant, with the intent to induce the plaintiff to enter into the contract, fraudulently and falsely represented to the plaintiff that the taxes on the real estate, which was the subject-matter of the contract, were $60 per year; that such representation was known to the defendant to be untrue; that the taxes on the real estate were $72.23 per year; and, further, that the plaintiff confided in such false representation, and, misled thereby, paid to the defendant the $100 as a part of the purchase money of the real estate.

The answer admitted the making of the contract and the payment of the earnest money, but denied the making of the alleged false representation, and also denied that the plaintiff was misled by any false representations of the defendant.

The case was tried by the court without a jury. The trial court found that the parties entered into the contract for the sale and purchase of the real estate; that the plaintiff paid on the purchase price thereof $100; and, further, that plaintiff was induced to enter into such contract and pay the defendant the $100 by certain false and fraudulent statements as to the amount of the taxes upon the property, which statements were made to plaintiff by the agent of the defendant, and relied upon by plaintiff, who was deceived thereby, and who, upon the discovery of such false representations, repudiated the contract and demanded return of the $100, no part of which has ever been returned to him. As a conclusion of law the trial court found that the plaintiff was entitled to judgment against the defendant for the sum of $100. The defendant appealed from an order denying its motion to amend the conclusions of law so as to direct judgment for it, and its motion for a new trial.

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The part of the order denying the motion to amend the conclusions of law is not appealable; but all the questions here raised by the defendant are reviewable on the appeal from the order denying the motion for a new trial.

1. The defendant's first contention is that the finding of fact that the plaintiff was induced to pay the $100 by certain false representations as to the amount of taxes on the property is too vague and uncertain to support a judgment, for the reason that such finding may refer to any kind of a false and fraudulent representation as to taxes whatsoever. The rule applicable to this question is well settled. If findings of fact are so uncertain that it is impossible to tell, by reference to the pleadings, what the court intended to find, they are not sufficient to support a judgment; but if such intention can be ascertained by reference to the pleadings, the objection that the findings are not sufficiently specific cannot be raised for the first time on appeal. The remedy is by motion to make more specific. Lesher v. Getman, 28 Minn. 95, 9 N. W. 585; Hewitt v. Blumenkranz, 33 Minn. 417, 23 N. W. 858; Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785.

Construing the findings in this case with reference to the pleadings, we hold that they are sufficient as against the objection that they are too uncertain to support the judgment.

2. It is further urged that the findings of fact do not sustain the conclusion of law, because there is no finding that the representation was made by the defendant with intent to deceive the plaintiff. It is true that an intent to deceive is an essential element in an action for deceit. But the finding of fact in this case, that the plaintiff was induced to enter into the contract by the false and fraudulent statements (representations) made by defendant and relied upon by plaintiff, who was deceived thereby, is the finding of an ultimate fact, and necessarily includes all the essential elements of an actionable fraudulent representation. The findings are sufficient as to defendant's intent to deceive.

3. The next contention of the defendant is that the findings of fact are not sustained by the evidence. It is urged in effect that

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the discrepancy between the amount of the taxes as represented and the actual amount thereof was relatively insignificant, and not a matter specially within the knowledge of the defendant, but a matter of public record, and could have been ascertained by the plaintiff as well as by the defendant; hence the plaintiff was not legally justified in relying upon the representation and repudiating the written contract, nor the court in setting it aside.

There was, however, evidence on the part of the plaintiff tending to show that the plaintiff stated to the defendant's agent, pending the negotiations, that the amount of the taxes was an important item with him, and asked the agent what the taxes were, who replied, "$60 per year," and that the plaintiff relied upon the statement, and would not have entered into the contract if he had known that the statement was not correct. The agent testified to the effect that he did not know the amount of the taxes, that the plaintiff asked him if he could give an approximate idea what the taxes were, and he said that he could, but did not tell the plaintiff that they would not exceed $60. The evidence, considered as a whole, was sufficient, if satisfactory to the trial court, to justify the inference that the representation did not refer alone to the amount of the then current taxes, but to the amount of the taxes per year; that is, the average annual tax burden up to the time of the making of the contract, a material matter for the consideration of a proposed purchaser of real estate. If the representation was material, and made by the agent of the defendant as of his own knowledge, when in fact he had none, with intent to induce the plaintiff to rely upon it, and he did so to his injury, the representation was a fraudulent one, and the consequences of the deceit cannot be avoided, merely because the plaintiff might have consulted the official tax records. Riggs v. Thorpe, 67 Minn. 217, 69 N. W. 891; Porter v. Fletcher, 25 Minn. 493; Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212. We hold that the findings of fact are sustained by the evidence within the rule applicable to such cases.

4. The plaintiff testified on his cross-examination that the representation was an important part of his buying the property.

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Thereupon he was asked by the defendant this question: "Why, then, didn't you have the guaranty in your contract?" The court sustained the plaintiff's objection to the question, and the ruling is here assigned as error. The latitude to be allowed on cross-examination of a witness is largely within the discretion of the trial judge, and the ruling in question was not an abuse of judicial discretion.

Order affirmed.

JOHN DURESEN v. FRED S. BLACKMARR and Another.[1]

April 12, 1912.

Nos. 17,559—(167).

Municipal court — jurisdiction.

The municipal court of the city of Minneapolis has no jurisdiction of a counterclaim, though arising out of the transaction made the basis of plaintiff's cause of action, where the amount thereof exceeds the sum of $500, the limit of the court's jurisdiction.

Action in the municipal court of Minneapolis to recover $255 damages for injuries to plaintiff's wagon and horses, caused by collision with defendant's automobile. In his answer defendant Blackmarr alleged that the collision was due solely to plaintiff's negligence, and interposed a counterclaim for $3,000 for injuries sustained. From an order overruling plaintiff's demurrer to the counterclaim, he appealed. Reversed.

Paul J. Thompson and *M. A. Hessian,* for appellant.

Lane & Malmberg, for respondent.

Brown, J.

This action was brought in the municipal court of the city of Minneapolis to recover the sum of $255, damages alleged to have been

[1] Reported in 135 N. W. 536.

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suffered by plaintiff as a result of a collision between his team and wagon and defendant's automobile; the complaint alleging that the collision was caused by the negligent operation of the automobile. Defendant Blackmarr, the driver of the automobile, interposed a counterclaim for $3,050, for injuries to his person from the collision, which, the answer alleges, was caused by the negligence of plaintiff. Plaintiff demurred to the answer, on the ground that the cause of action made the basis of the counterclaim was beyond the jurisdiction of the court, and that the court had no power or authority to hear or determine the same. The demurrer was overruled, and plaintiff appealed.

The only question presented is whether the municipal court of the city of Minneapolis has jurisdiction of a counterclaim interposed in an action at law for the recovery of money the amount of which exceeds the sum of $500, the limit of the jurisdiction of the court as fixed by law. We are of the opinion, and so hold, that the question should be answered in the negative.

The statute [Sp. Laws 1889, p. 599, c. 34, § 2] defining the jurisdiction of the court provides: "Said court shall be a court of record and shall have a clerk and a seal, and shall have jurisdiction to hear, try and determine civil actions at law where the amount in controversy does not exceed the sum of five hundred dollars."

The court is one of inferior or limited authority, with power to exercise the jurisdiction conferred, and no other. It may entertain and determine actions for the recovery of money, where the amount in controversy does not exceed $500. Whether a particular action comes within its jurisdiction is determined by the amount claimed by plaintiff in his complaint, and if within its jurisdiction defendant cannot deprive it thereof by setting up a counterclaim for an amount exceeding its authority. Barber v. Kennedy, 18 Minn. 196 (216). In no case for the recovery of money will the answer of defendant be referred to in determining the question of the court's jurisdiction of plaintiff's cause of action. The action as stated in the complaint controls that question.

Precisely the same rule applies to defendant where he interposes

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a counterclaim. A counterclaim is a cross-action against the plaintiff, and to entitle a defendant to be heard thereon in that court the cause of action stated by him must be within the limits of the court's jurisdiction. The court can no more exceed its jurisdiction on his demand than it can on the demand of the plaintiff; for, as remarked by Chief Justice Cassoday in Martin v. Eastman, 109 Wis. 286, 85 N. W. 361, the limitation as to jurisdiction applies to both parties to the action.

We have been cited to no case, save one from New York, where a contrary conclusion has been reached. Howard v. Buffalo, 176 N. Y. 1, 68 N. E. 66. That case involved the jurisdiction of the county court of New York, and it was held that as an incident of its jurisdiction the court could determine and adjudicate upon a counterclaim, though the amount thereof exceeded its statutory jurisdiction. The decision seems more arbitrary than logical, and is not in harmony with the general trend of authorities elsewhere.

In the case of justice courts, with limited jurisdiction, the courts are practically uniform, so far as our examination of the authorities has extended, in denying the jurisdiction of a counterclaim in excess of the amount fixed by law as the limit of their authority. The analogy between those courts and municipal courts, with a like, though larger in amount, jurisdictional limitation, is real, and not merely apparent. The reason for the rule withholding jurisdiction applies equally to both courts.

The jurisdiction was denied in the following cases: Maxfield v. Johnson, 30 Cal. 546; Seafkas v. Evey, 29 Ill. 178; Clancy v. Neumeyer, 51 N. J. L. 299, 17 Atl. 154; General Electric Co. v. Williams, 123 N. C. 51, 31 S. E. 288; Milliken v. Gardner, 37 Pa. St. 456; Johnson v. Goolsby (Tex. Civ. App.) 121 S. W. 883; Murphy v. Evans, 11 Ind. 517. Nor were the decisions cited predicated upon language like that found in our statutes limiting a justice court counterclaim to a cause of action which could be made the basis of an action before the justice against plaintiff, but rather upon the broad ground that the limitations as to jurisdiction applied to both parties to the action.

The authorities also hold that a counterclaim in excess of the ju-

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risdiction of the court may be pleaded as defensive matter, where no affirmative relief is demanded, and that the defendant may waive the excess by his pleading and demand judgment for an amount within the jurisdiction of the court. 24 Cyc. 572. Defendant in the case at bar, however, did not proceed in this manner. On the contrary, he demanded judgment for the full amount of his claim. Nor is the question in any way affected by the provisions of the municipal court act to the effect that, except as otherwise provided, that court may exercise all the powers of the district courts of the state. As to the amount of which the court may take jurisdiction the act creating the court "otherwise provides."

We therefore follow the rule of the authorities cited, and hold that the court below has no jurisdiction of the counterclaim, and the demurrer thereto should have been sustained. From this it does not follow that defendant is without a remedy. His cause of action, though arising out of the subject-matter of the complaint, is an independent right, and he may maintain a separate action to recover thereon. Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 45 L.R.A. 541, 71 Am. St. 469.

Order reversed.

W. B. JORDAN and Another v. NORTHWESTERN ELECTRIC EQUIPMENT COMPANY and Another.[1]

April 12, 1912.

Nos. 17,561—(184).

Appeal from order denying new trial — second appeal.

Where an appeal is taken from an order denying a new trial, and the order is affirmed, either on the merits, or on an equal division in opinion of the justices, or under the rules of court, no questions, which were or might have been determined on such appeal, can be raised on a subsequent appeal from the final judgment.

[1] Reported in 135 N. W. 529.

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After the former appeal of this case, reported infra, page 522, the cause was remanded and judgment was entered in the district court affirming the order appealed from. From the judgment entered pursuant to the findings and order of Hallam, J., plaintiffs appealed. Affirmed.

C. D. & R. D. O'Brien, for appellants.

How, Butler & Mitchell, for respondents.

PER CURIAM.

This case was before the court at the October, 1911, term upon an appeal by the plaintiffs from an order denying their motion for a new trial. The appeal, by reason of the illness of one of the justices, was heard by four justices of the court, who were equally divided in opinion. Thereupon judgment was entered affirming the order appealed from and remanding the case. Infra, page 522, 134 N. W. 1134. Judgment was entered in the district court in favor of the defendants, in accordance with the findings of fact and conclusions of law of that court. The plaintiffs appealed from the judgment, and here assign the same alleged errors that were assigned on the first appeal.

Where an appeal is taken from an order denying a new trial, and the order is affirmed, either on the merits, or under the rules of court, no questions, which were or might have been determined on such appeal, can be raised on a subsequent appeal from the final judgment; but such is not the effect of a mere dismissal of the appeal. 1 Dunnell, Minn. Digest, § 398.

This rule applies to a judgment in a case where the justices of this court are equally divided in opinion, for such a judgment is as binding on the parties to the particular action as any other judgment. It is not, however, a precedent in any other case. Willis v. Erie Tel. & Tel. Co. 37 Minn. 347, 34 N. W. 337; Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933; 3 Cyc. 406; Black, Judicial Precedents, 76.

We accordingly hold that the questions attempted to be raised by the assignments of error on this appeal are res adjudicata.

Judgment affirmed.

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O. S. BURHO v. DANIEL F. CARMICHIEL.[1]

April 12, 1912.

Nos. 17,565—(131).

Attorney and client — contract against public policy.

A contract of employment between an attorney and his client, whereby the client is prohibited from settling his cause of action unless the attorney consents thereto, is contrary to public policy and void.

Contract invalid.

A clause in such contract wherein the client agrees not to employ any other attorney to present, prosecute, or collect the claim, and not to settle the claim except through the attorney named in the contract, is *held* to be an attempt to prohibit the client from settling without the consent of the attorney, and to vitiate the entire contract.

Action in the district court for Hennepin county to cancel a certain written contract. From an order, Steele, J., overruling plaintiff's demurrer to the answer, he appealed. Reversed.

W. R. Duxbury, for appellant.

Homer Morris, for respondent.

HOLT, J.

This action is brought to cancel a written contract under the terms of which plaintiff employed the defendant, an attorney at law, to prosecute, settle, and collect a claim for damages which plaintiff had against a railway company on account of serious personal injuries sustained through its negligence.

The complaint alleges that when the contract was signed plaintiff was not mentally capable of contracting, being then under the influence of the anæsthetic administered for the surgical operation

[1] Reported in 135 N. W. 386.

[Note] Validity of provision, in contract for contingent fee, forbidding client to settle the claim without attorney's consent, see note in 14 L.R.A.(N.S.) 1101.

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rendered imperative by the injuries received, and also that he was induced to sign by reason of the fraud and misrepresentation of the defendant. The contract is attached to and made a part of the complaint.

The answer contains two defenses and a so-called cross-bill, wherein the defendant asks that plaintiff be enjoined from dismissing the suit which defendant, as plaintiff's attorney, brought against the railway company, or settling it except through defendant. The defenses pleaded in the answer and also made a part of the cross-bill are, in short, that plaintiff was capable of contracting at the time the agreement was signed, that he has repeatedly since recognized the contract as valid, and has knowingly suffered the defendant to do work and expend money in preparing for trial the action instituted against the railway company pursuant to the contract, and that no fraud was practiced to induce plaintiff to sign the document. A demurrer interposed to this answer was overruled, and the correctness of the ruling is challenged by this appeal.

If the contract of employment is void the court erred in overruling the demurrer, for there can then be no legal defense to the demand for its cancelation. The defendant bases his entire right to act as plaintiff's attorney upon the contract. If it be invalid, it is utterly immaterial in this action how it was obtained, or whether plaintiff's present attorney or the defendant used the more reprehensible and unprofessional means, or are on par, in the attempt to obtain the right to control plaintiff's cause of action. On the other hand, if the contract be valid on its face, the order should be affirmed. The contract is assailed because of this clause therein:

"I further agree not to employ any other attorney to present, prosecute, or collect said claim, and that I will not settle such claim except through said Daniel F. Carmichiel."

Any contract, or clause in a contract, between an attorney and his client, whereby the client is deprived of the right to compromise, settle, or dismiss his cause of action, should be held to be contrary to public policy and void. Legislatures, courts, and public opinion are united upon the desirability of discouraging strife and litigation

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among men, and to that end favor termination of disputes. Therefore the owner of a claim against another should at all times have the unrestricted right to let it lie dormant and unenforced, or, if he has asserted it by bringing suit, he should retain the right to end the suit when and in such manner as he sees fit, subject to the right of the attorney to compensation. Any contract or provision therein by which this right is surrendered to another, is void. Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12, 291; In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. 533, 13 An. Cas. 441.

Does the clause quoted above from the contract abridge plaintiff's right to settle or terminate his own lawsuit? Of course, if it means no more than an agreement to inform his counsel before a settlement is had, so that the latter may be protected, and also be in position to render that advice and service in the settlement which is usual and proper, the clause is valid and unobjectionable. My associates consider that such construction is not to be given this clause, but rather that the intention and purpose thereby was to prohibit plaintiff from making any settlement except such as the attorney consented to. The employment being upon a percentage of the recovery, the defendant intended to exact the right to determine the amount of the settlement, and prevent it, unless such amount met his approval. The attorney evidently was not satisfied with the lien given him by statute, but attempted to so get control of plaintiff and his cause of action that no attempt at settlement could be made unless he (the attorney) chose to let it go through. It may be contended that this interpretation of the clause is further emphasized by the provision therein against the employment of any other attorney, thus attempting to vest exclusive control of the cause of action in the defendant. The court is also of the opinion that the obnoxious clause is so closely connected with the main subject-matter of the agreement, that the contract as a whole is void.

The writer hereof believes the clause attacked may be given such an interpretation that the contract will not be contrary to public policy. If two constructions may be given to a contract, one of

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which makes it valid and the other void, that one which makes it valid should be adopted. Furthermore, in contracts between a client and his attorney the most favorable construction must be given to the rights of the client. With these principles in mind, I find no difficulty in interpreting the clause under consideration as an agreement on the part of plaintiff to advise with defendant as to any probable settlement, and, if plaintiff concludes to make the same, that the defendant, as the attorney, is to carry out plaintiff's desires.

While we are all aware of the fact that an unseemly and pernicious custom has grown up in the legal profession to prematurely seek out and secure personal injury cases, we also know that the agents and attorneys of the defendants in such cases and of the liability insurance companies interested are equally vigilant, and often not overscrupulous in attempting to secure settlements which are inadequate and unfair to the one injured. It seems, therefore, desirable that a client should have the assistance and advice of his attorney in any compromise that may be made in a personal injury suit, and a stipulation to that effect ought not to be illegal.

The opinion of the court, however, is that the demurrer should have been sustained.

Order reversed.

WILLIAM F. OLSEN v. BIBB COMPANY.[1]

April 12, 1912.

Nos. 17,669—(229).

Legal newspaper.

"Finance and Commerce," a daily paper published in Minneapolis, is a newspaper qualified as a medium of official and legal publications under R. L. 1905, § 5515.

In proceedings in the district court for Hennepin county for the

[1] Reported in 135 N. W. 385.

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dissolution of the Bibb Company, a corporation, William F. Olsen, a creditor, made a motion for an order setting aside an order appointing C. C. Wentworth trustee of said corporation, on the ground that the publication of notice in "Finance and Commerce" was insufficient to give the court jurisdiction over said Olsen, for the reason that "Finance and Commerce" was not a qualified newspaper as required by statute. The motion was heard on stipulated facts by Waite, J., and denied. From the order denying the motion, Olsen appealed. Affirmed.

Harry Rauch, for appellant.

Herbert T. Park, for respondent.

BUNN, J.

The Bibb Company, a corporation, on December 23, 1911, petitioned the district court for Hennepin county for an order dissolving said corporation and appointing a trustee to collect and distribute its assets. The court ordered the petition heard at a special term to be held January 20, 1912, and that notice of the order be given by publishing a copy of the same in a legal newspaper in the county of Hennepin for three successive weeks. Petitioner caused the order to be published in "Finance and Commerce" for three successive weeks, and the court on January 20, after hearing the evidence, granted the petition and appointed a trustee, who qualified and proceeded to act as such. February 21, 1912, William F. Olsen, a creditor of the corporation, moved the court for an order setting aside its order of January 20, appointing the trustee, on the ground that "Finance and Commerce" was not a qualified newspaper. This motion was heard by the trial court on a stipulation of facts, and denied. Olsen appealed to this court.

The question before us is whether "Finance and Commerce" is a qualified newspaper under the laws of this state. The facts, as shown by the stipulation and the copies of the publication made part of the record, are as follows: Olsen had no actual notice of the proceedings and was not a subscriber to the paper. "Finance and Commerce" is a paper published daily in Minneapolis in the Eng-

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lish language, and has been so published for more than twelve years. It consists of not less than four pages, containing six columns on each page, and is delivered each day, except Sunday, to eleven hundred paying subscribers in and near Minneapolis. In short, "Finance and Commerce" is qualified as a medium of official and legal publications, under R. L. 1905, § 5515, and the acts amendatory thereof, unless it does not comply with subdivision 3 of section 5515, providing that it shall "contain general and local news, comment and miscellany."

The stipulation states that the columns of "Finance and Commerce" are devoted primarily to the publication of legal matters, including the United States courts, the supreme court of this state, and the district, probate, and municipal courts of Hennepin and Ramsey counties, giving a complete report of the cases filed, the cases tried, and the results of such trials, the calendar of bankruptcy proceedings, the calendar of cases standing for trial in the courts, and the general proceedings of Congress and the state legislature when in session, a complete daily record of all instruments filed in the office of the registers of deeds of Hennepin county and of Ramsey county, all chattel mortgages and releases filed, all corporations organized, and all sales of real estate under judicial process. It contains "at least two or more columns of news, including general, theatrical, and current news," publishes market quotations, financial statements, and bank clearings, lists of mortgage foreclosure sales, with the dates when the same will take place, and general items pertaining to city council proceedings of Minneapolis.

It may be conceded that "Finance and Commerce" is not light reading. But each copy contains intelligence of vital importance to many classes of men. News of court proceedings, the markets, the proceedings of Congress and the legislature, is of far greater interest to lawyers and business men than is an account of a political meeting, a social gathering, or a murder. It is not the particular kind of intelligence published that constitutes one publication a newspaper rather than another. Kellogg v. Carrico, 47 Mo. 157. And "Finance and Commerce," though mainly devoted to legal and business

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news, does publish each day items of general news. The authorities from other states are practically uniform in holding that a paper like the one in question is a legal newspaper. Kingman v. Waugh, 139 Mo. 360, 40 S. W. 884; Kerr v. Hitt, 75 Ill. 51; Turney v. Blomstrom, 62 Neb. 616, 87 N. W. 339; Puget Sound v. Times Pub. Co. 33 Wash. 551, 74 Pac. 802; Hall v. City, 115 Wis. 479, 91 N. W. 998; Brice v. Graves, 142 Iowa, 722, 121 N. W. 504; Williams v. Colwell, 14 App. Div. 26, 18 Misc. 399, 43 N. Y. Supp. 720; Railton v. Lauder, 126 Ill. 219, 18 N. E. 555; Lynch v. Durfee, 101 Mich. 171, 59 N. W. 409, 24 L.R.A. 793, 45 Am. St. 404; Lynn v. Allen, 145 Ind. 584, 44 N. E. 646, 33 L.R.A. 779, 57 Am. St. 223. In view of these decisions, and especially in view of the great number of titles that a contrary holding would effect, we hold that "Finance and Commerce" is qualified as a medium of official and legal publications under R. L. 1905, § 5515. The case of Beecher v. Stephens, 25 Minn. 146, is clearly distinguishable.

Appellant's argument that the paper has not a general circulation, and therefore is not qualified, is not sustained. The statute requires that a newspaper be circulated in or near its place of publication to the extent of at least two hundred forty copies regularly delivered to paying subscribers. The circulation of the paper in question is sufficient, both as to character and extent.

Order affirmed.

NORTHERN PACIFIC RAILWAY COMPANY v. WISCONSIN CENTRAL RAILWAY COMPANY and Another.[1]

April 19, 1912.

Nos. 17,299—(23).

Contract between railroad companies — consideration.

An agreement, between the Northern Pacific Railway Company and the

[1] Reported in 135 N. W. 984.

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Wisconsin Central Railway Company, concerning the use by the latter of a certain railroad bridge, owned by the former, over the St. Louis river, a navigable stream, *held* supported by a sufficient consideration, notwithstanding that such bridge was constructed under an act of Congress providing that the owner of such bridge shall admit all other companies to the use thereof upon equal terms, upon the payment of reasonable compensation for such use, and subject to such conditions and regulations as to method of use, etc., as shall be fixed by agreement of the parties, or, in default of such agreement, by the Secretary of War.

Contract not contrary to statute.

Such agreement, though construed as a binding contract between the parties, *held* not contrary to the intent and purpose of such act of Congress, as tending to render the owner of the bridge incapable of complying with the mandate of the act as to the admission of all railroads to the use of such bridge upon equal terms, etc.

Contract construed.

Such agreement construed, and *held* to be a contract which obligated the Wisconsin Central Railway Company to the payment of the rentals specified thereby, whether such company used the bridge or not.

Action in the district court for Ramsey county against the Wisconsin Central Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, to recover $15,921.74 upon two contracts for the use of a certain drawbridge and terminals. The substance of the contracts is given in the opinion.

The amended separate answer of the Central Company admitted that "in compliance with an act of the Congress of the United States" "approved January 3, 1887," it executed the contract mentioned in the opinion as Exhibit A. It also admitted the execution of the contract called Exhibit B, and the execution on April 1, 1909, of the lease of the Central Company to the defendant Soo Company. It further alleged that a bridge was built pursuant to the act of Congress and had been operated by plaintiff and others ever since it was constructed; that there was no consideration paid to or received by the Central Company for the execution of Exhibit A; that no changes had been made by plaintiff in respect to the tracks described in Exhibits A or B, or such bridge, for the benefit or use of either

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defendant, and plaintiff had not incurred any obligation or expense or foreborne to exercise any legal right which it otherwise could have exercised by reason of either Exhibit A or Exhibit B; that the track east of Grassy Point bridge described in Exhibit B was wholly located within the state of Wisconsin, no application had ever been made to the Railroad Commission of Wisconsin for a certificate of convenience and necessity authorizing either defendant to extend its line so as to include the track described in Exhibit B, no such certificate or a copy had ever been filed in the office of the Secretary of State of Wisconsin or of the register of deeds of the county where the tracks are located, and that none of the requirements of Wisconsin Laws 1907, c. 454, had ever been complied with in respect to such extension. It further alleged that prior to April 1, 1909, the Soo Company had duly arranged for the use of the bridge known as the Interstate bridge, which crosses the St. Louis river between the states of Wisconsin and Minnesota; that the line of the Soo Company connected directly with the line of the answering defendant and that the distance between the points of connection by way of the answering defendant's line and the Grassy Point bridge to the answering defendant's depot in Duluth was three and seven tenths miles longer than the distance over the lines of the defendant Soo Company to the same depot; that said Soo Company after it acquired possession and control of the tracks and terminal facilities of the answering defendant had ample track and terminal facilities for transacting all the business of both defendants in and out of the cities of Superior and Duluth, and much prompter and better service could be furnished the public over the lines of the Soo Company than by way of the Grassy Point bridge. That immediately after April 1, 1909, the answering defendant notified the plaintiff of the execution of the lease of its property to the Soo Company, and notified plaintiff that neither of the defendants could or would make any use of the Grassy Point bridge or of the track described in Exhibit B.

The amended separate answer of the Soo Company was substantially the same as that of the Central Company.

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The case was tried before Dickson, J., who made findings and as conclusions of law ordered judgment that plaintiff take nothing by its cause of action based on Exhibit A for rent of the Grassy Point bridge; that plaintiff was entitled to judgment on its second cause of action for $1,749.93 rent and for $1,046.81, cash paid out for taxes and maintenance, and interest thereon. From the judgment in favor of plaintiff entered pursuant to the order for $3,057.12, plaintiff appealed.

Modified by adding thereto the amount due on contract described as Exhibit A, and remanded with direction to the trial court to proceed in accordance with this conclusion.

C. W. Bunn and *Emerson Hadley,* for appellant.

John L. Erdall, M. D. Munn and *A. H. Bright,* for respondents.

Philip E. Brown, J.

This action is brought by the Northern Pacific Railway Company, hereinafter called the Pacific Company, against the Wisconsin Central Railway Company, hereinafter called the Central Company, and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereinafter called the Soo Company, to recover the compensation or rent reserved and provided for in two certain contracts or agreements entered into between the Pacific Company and the Central Company for the use of a certain drawbridge and the terminals thereof, and a certain piece of track to the east of the easterly approach to the said bridge, which said agreements are referred to in the complaint as Exhibit A and Exhibit B. The cause was tried by the court without a jury, findings were made in favor of the defendants upon Exhibit A, and in favor of the plaintiff upon Exhibit B. This is an appeal by the plaintiff from the judgment rendered upon such findings.

The following are the main facts of the case:

The said drawbridge, for the use of which the said contract (Exhibit A) was entered into, is known as the "Grassy Point Bridge," and crosses the St. Louis river, a navigable stream, between the city

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of Superior, Wisconsin, and the city of Duluth, Minnesota. It was erected by the St. Paul & Duluth Railroad Company, the plaintiff's predecessor, under and pursuant to authority of an act of Congress entitled "An act to authorize the construction of a bridge across the St. Louis river at the most accessible point between the states of Minnesota and Wisconsin," approved January 3, 1887 [24 St. 356, c. 15]. Subsequently to the acquisition of the said bridge by the Pacific Company, and prior to June 4, 1907, the Central Company had located and was constructing a line of railway extending, among other places, between Duluth and Superior, respectively, as aforesaid, and desired to obtain from the Pacific Company the right to connect its line of railway with the easterly and westerly approaches to the aforesaid bridge; and to this end, on June 4, 1907, it entered into the agreement (Exhibit A) with the Pacific Company.

This agreement, after reciting the desire of the Central Company to connect with the line of the Pacific Company as above stated, and further reciting the Central Company's desire to obtain from the Pacific Company the right to use the aforesaid drawbridge and the approaches thereto * * * as a part of the Central Company's railway between the said cities of Superior and Duluth, and the willingness of the Pacific Company to grant such right upon the terms and conditions recited and to be recited in the agreement, and the value of the bridge, proceeds, in substance and effect, so far as is deemed material to the questions presented by this appeal, as follows:

First, That the Pacific Company "gives and grants" to the Central Company the right—to be enjoyed in common with the Pacific Company and such other railroad companies as may be hereafter admitted to the use of the said track and bridge—to connect its tracks with those of the Pacific Company at the easterly and westerly approaches to the said drawbridge, to enter upon such approaches for the purpose of making all such connections as shall be necessary to the full enjoyment of this "grant," and to run its trains over the said approaches and drawbridge.

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Second. The Pacific Company reserves the right to lay new tracks and to alter the bridge or replace it with a new structure, in which case, however, the Central Company's rights shall not be affected, except as may result from the increased value of the bridge.

Third. The Central Company agrees to install, at its own expense and according to plans to be submitted to the Pacific Company, an interlocking and derailing apparatus, and to maintain and operate the same at its own expense.

Fourth. Provides for the regulation of the passage of trains arriving at the bridge at the same time.

Fifth. Provides for the reimbursement of the Central Company as to part of the cost of the interlocking and derailing apparatus, in the event of the admission of other companies to the use of the bridge.

Sixth. The Central Company shall "indemnify the Pacific Company against all loss, cost, damage, or expense of any kind which said last-named company may suffer, or for which it may become liable, resulting from any neglect or failure of the Central Company strictly to keep and perform all its covenants and agreements in this contract contained. It is mutually agreed between the parties hereto that each party shall bear and pay any and all loss and damage to its own property, and to property in its charge, and all loss and damage for any injury to or death of any of its employees, or of any person in its care as a carrier or otherwise, arising from the fault or negligence of any person employed in the operation of said interlocking and derailing plant, and each party shall bear and pay all loss and damage, claim, or recovery, resulting from the fault or negligence of its exclusive employees, and each party agrees to indemnify the other against and save it harmless from all such claims, loss, damage, and recovery which by the terms hereof it has assumed and agrees to pay, together with all costs, expenses, and attorney's fees incident thereto. All employees engaged in the operation of said interlocking and derailing plant shall, as to any question of responsibility for their acts and omissions, be deemed to be joint employees of the parties hereto."

Seventh. The Pacific Company will keep account of the expense

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of all permanent improvements and additions to the bridge, and, "so long as only the two parties hereto use the property, the Central Company will pay unto the Pacific Company on the first day of each month, a minimum rental of six hundred twenty-five dollars ($625.00), to be increased from time to time so as to at all times equal half the interest upon the then value of the bridge and approaches, computed at five per cent per annum; but, if and when there shall be more than two users of the property, the rental shall be such part of the interest, so computed, as the number of wheels the Central Company moves over the same each month bears to the whole number of wheels of all users, the minimum rental, however, to be one-third of such interest. Provided, however, that the maximum rental shall never exceed one-half of said interest."

Eighth. "The Pacific Company shall keep and maintain in good order, condition, and repair the said bridge and approaches, and operate the same in such manner as to safely carry the traffic of the parties hereto," a certain proportion of the expense of such operation, etc., to be computed with reference to the number of users of the bridge, to be paid by the Central Company in addition to the aforesaid rental.

Ninth. The parties agree to arbitrate disagreements that may arise as to the interpretation of this agreement.

Tenth. "This agreement shall begin on the date when the Central Company commences to use the bridge, but upon January 1, 1909, whether it then uses the bridge or not, and shall continue twenty-five (25) years."

Eleventh. "The grants, covenants, and stipulations hereof shall extend to and be binding upon the respective successors and assigns of the parties hereto."

Subsequently to the execution of this agreement, and on March 8, 1908, the Pacific Company and the Central Company entered into another agreement, entitled in the complaint as "Exhibit B," whereby the Pacific Company granted to the Central Company the right to use for the passage of its trains several thousand feet of the tracks of the Pacific Company in Superior, Wisconsin, lying just east of

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the eastern approach to the said Grassy Point bridge, for which the Central Company agreed to pay a certain monthly rental, which said agreement was to "take effect on the day the Central Company commences to use said track, but not later than January 1, 1909, and shall continue in force for the term of three (3) years, and thereafter until either party shall give to the other one year's notice in writing of its desire to terminate the same." This contract or lease (Exhibit B) was entered into by the Central Company in part execution of a more general and comprehensive plan then in process of execution for the extension of its line into and across a portion of the state of Wisconsin.

But before the Central Company had availed itself of any of the rights and privileges purported to be granted by these two agreements, and without having made any use of the said track, bridge, or bridge terminals, the Soo Company succeeded to its property and rights, and assumed all its liabilities; and on June 4, 1910, the Soo and the Central Companies notified the Pacific Company of such succession, and, further, that neither of such companies, could or would make any use of the said Grassy Point bridge or the piece of track to the east thereof.

No changes, improvements, alterations, or repairs have ever been made in or upon the said bridge by the Pacific Company because or on account of the said contract (Exhibit A), or for the purpose of accommodating either of the defendants or to prepare the same for their use, and since the execution of the said agreement neither of the defendants have used or demanded the use of or attempted to use the said bridge, but have provided themselves with other facilities for crossing the said St. Louis river, and have not and do not now require the use of the said bridge. The consideration of one dollar, recited in the agreement (Exhibit A) as moving from the Pacific Company to the Central Company, was not paid.

1. The defendants' main contention is that the agreement, Exhibit A, for the use of the Grassy Point bridge, is without consideration. On this question there is no dispute concerning the facts. It

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is admitted that the formal consideration of one dollar recited in the instrument as moving from the Pacific Company to the Central Company was not paid, that the like consideration recited as moving from the Central Company to the Pacific Company was not paid, and that neither the Central Company nor the Soo Company has made any use of the bridge. The sole consideration, therefore, consists in the mutual covenants and agreements contained in the instrument, and the benefits, if any, derived therefrom. Aside from the effect of some act of Congress affecting the rights of the parties in and to the use of this bridge, it is too clear for argument that the agreement in question is supported by a legal and sufficient consideration moving from the Pacific Company to the Central Company. As before stated, however, it appears that this bridge was constructed pursuant to an act of Congress, section 6 of which reads as follows [24 St. 357]:

"That all railroad companies desiring the use of said bridge shall have and be entitled to equal rights and privileges relative to the passage of railroad trains or cars over the same, and over the approaches thereto, upon payment of a reasonable compensation for such use; and in case the owner or owners of said bridge and the several railroad companies, or any one of them, desiring such use, shall fail to agree upon the sum or sums to be paid, and upon rules and conditions to which each shall conform in using said bridge, all matters at issue between them shall be decided by the Secretary of War upon a hearing of the allegations and proofs of the parties."

It is the defendants' contention that this act "expressly granted to the Central Company the right to use this bridge and approaches; that this act, as a condition precedent to the right to construct the bridge, imposed upon the predecessor of the Pacific Company, and the Pacific Company, the legal obligation and duty of permitting the Central Company to such use;" and "that the alleged grant to the Central Company of such right furnished no consideration for any agreement to pay the rentals sued for in this case in the absence of actual use." In other words, the defendants contend that the agreement (Exhibit A) purports to obligate the Pacific Company

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merely to the performance of an existing legal obligation, and hence is without consideration.

It is unquestionably the law that the performance of or an agreement to perform an existing legal obligation is not alone a sufficient consideration for a contract, and the defendants' contention that the act under which this bridge was constructed is to be considered as a part of the contract entered into by the parties for its use is likewise well founded. If, therefore, as contended by the defendants, this agreement which we are considering, with the provisions of this act of Congress incorporated into it, grants to the Central Company no right, benefit, or privilege not already possessed by it by virtue of the provisions of such act, then the defendants' contention that such agreement is without consideration must, of course, be sustained. The determination of this question involves, therefore, a consideration of such act of Congress.

We find no authorities directly construing this act, but have been cited to a number of cases construing acts analogous thereto, and to these cases will refer later. The defendants' contention, as we understand it, is that the act of Congress in question gives to the defendants the absolute right to use the Grassy Point bridge upon payment of reasonable compensation for such use, and, further, that, as it is conceded that the compensation named in Exhibit A is a reasonable one, there was no consideration for such agreement. We cannot assent to this proposition. We think that this act of Congress contemplates that the owner of the Grassy Point bridge shall not act the part of the dog in the manger as to the excess capacity thereof. In other words, we think that the act gives any railroad company the right to use the bridge up to the fair limits of its capacity (Union Pacific Ry. Co. v. Mason City & Fort Dodge R. Co. 199 U. S. 160, 168, 26 Sup. Ct. 19, 50 L. ed. 134), but that before such use can be had the owner of the bridge and the company so desiring to use it must agree upon the compensation to be paid for such use, and upon the rules and conditions to which each shall conform in using the bridge, or else such matters must be determined by the Secretary of War as provided in the act, and that until

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such agreement or such determination by the said secretary has been made the applying company has no right to the use of the bridge.

Can it be said, then, that the agreement (Exhibit A) is without consideration, when it makes certain that which is left uncertain by the act of Congress, when it makes personal and presently enforceable a right theretofore appertaining to the Central Company as an indeterminate member of a general class and not presently enforceable, and when it binds the Pacific Company to the present duty of admitting the Central Company to the use of the bridge for a determinate period? Can it be said that such an agreement is without consideration, or, in other words, that the agreement under consideration grants no right, benefit, or privilege not theretofore possessed by the Central Company by virtue of the provisions of the act of Congress? We think not. If the mutual covenants and agreements of Exhibit A do not constitute sufficient consideration each for the others, how could the requirement of the act of Congress that the parties must come to an agreement as to compensation, manner of use, etc., ever be carried out? If such an agreement is without consideration, what would prevent the owner of the bridge from repudiating it as soon as made, thus compelling the applicant to apply to the Secretary of War, and so on as often as any agreement is made? We do not think the act of Congress contemplates any such absurdity. We think its manifest intent to be that the parties shall, if possible, come to an agreement as to compensation, conditions of use, etc., and that such agreement, when made, shall be binding. We do not, of course, mean that the act necessarily contemplates more than a provisional agreement; but, on the other hand, we do not think that it precludes the parties from more fully and absolutely binding themselves, and, if a provisional agreement would be valid and binding, why not the absolute one by which the owner of the bridge grants the present right to use upon certain terms, etc., recited, while the other company at least impliedly undertakes and agrees to use the bridge upon such terms, etc.?

But, the defendants continually ask, what is the consideration for the Central Company's agreement to pay rent? This question we

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think we have already answered by the comparison of this company's status with regard to the bridge with and without the agreement under consideration; but, if more need be said, we think it sufficient to advert to the manifest purpose of the Central Company in entering into this agreement. This company had certain extensions of its line in view. In order to carry out these plans, it had to get across the river. To this end it made the contract in question, and thereby cleared away all obstacles to the accomplishment of this part of their plans, and obtained assurance against delay that might be incident to the enforcement of its more or less indeterminate statutory right, and avoided the expense of an application to the Secretary of War; and thus it was ready to proceed with its extension without hindrance or delay. And it seems that it would have gone ahead with this extension, and availed itself of this contract, and probably even insisted upon its validity, had not its properties and rights been sold, in the meantime, to a company which did not need the use of the Grassy Point bridge.

It is true that in Union Pacific Ry. Co. v. Mason City & Fort Dodge R. Co. 199 U. S. 160, 26 Sup. Ct. 19, 50 L. ed. 134, the court held that the Mason City Company had a statutory right to use the Union Pacific Company's Omaha bridge over the Missouri river. It is likewise true that such court, in commenting upon the decision in Union Pacific Ry. Co. v. Chicago, Rock Island & P. Ry. Co. 2 C. C. A. 174, 51 Fed. 309, where the Circuit Court of Appeals affirmed the judgment entered in the Circuit Court (47 Fed. 15) primarily upon the contracts between the parties, adverted to another basis upon which the decree of the Circuit Court of Appeals was affirmed by the Supreme Court (163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265), to wit, the statutory duty of the Union Pacific Company to let the Rock Island Company use the bridge; and it is true that the Supreme Court, in the Mason City case, declared that the contracts involved in the Rock Island case "might be regarded as simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control." But it is to be noted that the court in this Mason City case

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likewise recognized that its decision in the Rock Island case rested in part, at least, upon the contracts between the parties. The language of the court in this connection is: "Here the decision was rested, not simply on the contracts, but also on an obligation held to have been imposed on the defendant by the statutes of the United States." This, we think, clearly shows a recognition of the validity of such contracts, and robs its declaration, that such contracts might have been disregarded, of the significance attached thereto by counsel for the defendants in the case now before us.

Furthermore, the statute involved in these two Omaha Bridge cases was in a certain respect different from that under which the Grassy Point bridge was constructed, in that in the former there was no provision for an agreement between the parties as a condition precedent to the right of other companies to use the bridge. The provision there was that other companies should be allowed to use the bridge "for reasonable compensation, to be made to the owners of said bridge," and all that the Supreme Court held in the Mason City case was that the Mason City Company, having tendered such compensation, was entitled to use the bridge. We fail to see how this ruling can be successfully invoked as authority for the proposition that the parties, even under the statute involved in that case, might not have entered into a binding contract for the use of the bridge, had they seen fit to do so. Certainly we do not see how this ruling can militate against the validity of the contract for the use of the Grassy Point bridge, when the act under which such bridge was constructed expressly provides for an agreement between the parties, or its substitute, the appeal to the Secretary of War, as a condition precedent to the right of others than the owner to use the bridge.

2. What we have said in disposing of the defendants' first contention practically disposes of their second, to wit, that the Pacific Company could not make such a contract as that evidenced by Exhibit A, for the reason that such a contract would be inconsistent with the clearly expressed purpose of the act of Congress under which the Grassy Point bridge was constructed. Since, as we have already held, this act was intended merely to prevent the owner of

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the bridge from making an arbitrarily monopolistic and discriminatory use of the bridge, we think it follows that the contract (Exhibit A) not only does not violate either the letter or the spirit of the act of Congress, but is just such a contract as was contemplated by Congress when it provided that other railroad companies desiring to use this bridge should come to an agreement with the owner thereof as to the compensation to be paid for such use and the conditions and regulations to be observed therein.

The only possible contention to the contrary rests upon the idea that the contract incapacitated the Pacific Company from obeying the mandate of the act of Congress that "all railroad companies desiring the use of said bridge shall have and be entitled to equal rights and privileges relative to the passage of railroad trains or cars over the same," etc., and we understand this to be the gravamen of the defendants' second contention. We have already adverted to the limitation with respect to capacity, which must be interpolated into this statutory provision, and, as so limited, it would seem that there is nothing in such provision to prevent the Pacific Company from entering into a bona fide contract with one or more other companies for the use of the entire excess capacity of this bridge over and above the needs of the Pacific Company's own traffic.

But, if there be doubt as to the correctness of this proposition, we think it is conclusively settled by the case of Union Pacific Ry. Co. v. Chicago, R. I. & Pac. Ry. Co. 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265, where an act of Congress and a contract closely analogous to the act and contract in this case were construed and adjudicated upon. In that case the Chicago, Rock Island & Pacific Railway Company, commonly called the Rock Island Company, sought specific performance of a certain trackage contract with the Union Pacific Railway Company, whereby the Pacific Company let the Rock Island Company "into the full, equal, and joint possession and use of its main and passing tracks, * * * including the bridge on which said tracks extend across the Missouri river, * * * for the term of nine hundred ninety-nine years," etc., and which further provided, after making provision for compensation, mode of

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use, etc., that the Pacific Company might admit any other company to the use of the said bridge and tracks upon substantially the same terms, "provided such additional burden did not interfere with the Rock Island Company."

The Pacific Company resisted the performance of this contract on the ground, among others, that such contract was unauthorized, and to meet this contention the Rock Island Company invoked the provisions of the Bridge Act of 1866 (14 St. 244, c. 246), which provided that "when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation to be made to the owners of said bridge under the limitations and conditions hereinafter provided." The court held that this provision applied to the bridge in question in that case, and upheld the contract as being one calculated to carry out the intent and purpose of the provisions of the act of Congress cited.

"It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress," said Mr. Chief Justice Fuller, in delivering the opinion of the court on this point, "and * * * it is in effectuation of that policy that such business arrangements as will make such connections effective are made. We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property, or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands

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of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to perform its own immediate duties to the public is the limitation on its jus disponendi we are considering, and that limitation had no application to such a use as that in question."

Again, at page 590, the Chief Justice, in disposing of the defendant's contention that the contract would disable it from performing its charter duties to the public, continues: "It will not do to hold this contract void, and allow defendant to escape from the obligations it assumed, on the mere suggestion that at some time in the remote future there is a possibility that the suggested contingency might arise. Should it happen, however, the courts are competent to relieve from the consequences of so radical a change of condition."

We think this language is peculiarly applicable to the defendants' second contention in the case before us. It is true that the contract between the Union Pacific Company and the Rock Island Company involved the use of other tracks besides those on the Omaha bridge, and that the defendant's contention there was broader than that of the defendants' contention here, in that it was broadly contended that the nine hundred ninety-nine-year lease involved a surrender by the Union Pacific Company of its corporate powers and a disability to perform its corporate duties to the public; but we think the language quoted above nevertheless applicable to the contract in the case before us, for there the plaintiff successfully invoked in behalf of the contract an act of Congress analogous, for all present intents and purposes, to the act here invoked against the contract, and we do not see how we can arrive at any other conclusion than that arrived at by the Supreme Court of the United States in the Rock Island case, to wit, that the contract is calculated to carry into effect the very purpose of the act of Congress, and cannot be upset upon the remote contingency of future complications that may possibly arise by reason of future applications by other companies for the right to use the bridge. Chicago, R. I. & P. Ry. Co. v. Union Pacific Ry. Co. (C. C.) 47 Fed. 15, 23. And we are unable to understand how the fact

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that the defendants here will not avail themselves of the provisions of their contract can possibly increase the probability of such future complications or in any way militate against the validity of the contract.

If we were in doubt as to the correctness of our understanding of the decision in the Rock Island case, our doubt would be settled by reference to what Mr. Justice Brewer said in delivering the opinion of the court in the Mason City case, supra, in referring to the Rock Island case. He says, at 199 U. S. 165, 26 Sup. Ct. 20, 50 L. ed. 134: "Indeed, the alleged invalidity of the contracts was rested largely upon the scope of the statutes, and the duties to the government and the public imposed thereby on the railroad company." Again at page 165, he says, still referring to the Rock Island case, supra: "Here the decision was rested, not simply on the contracts, but also on an obligation held to have been imposed on the defendant by the statutes." And again at page 166, he says: "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity."

This language, we think, clearly shows that the court, in the Mason City case, recognized the language of the court in the Rock Island case as applying to the effect of the Omaha Bridge act. Such being the case, we think that the Rock Island case, supra, is conclusive against the defendants' second contention, and therefore we must hold that the contract (Exhibit A) does not contravene the intent and purpose of or any limitation imposed by the act of Congress under which the Grassy Point bridge was constructed.

3. The defendants' third contention is that the contract (Exhibit A) "was not intended to and does not obligate the Central Company either to use this bridge or to pay the compensation named for a period of twenty-five years, but was simply an arrangement entered into by the parties pursuant to and as required by the act of Congress, settling minor matters, such as compensation and method of use."

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That this contention is not well founded is, we think, too plain for argument. The preliminary recitals of the contract are that the Central Company had already located and was constructing a line of railway which would extend between Duluth and Superior; that the said company "desires to obtain * * * the right to connect," etc. (not "may desire or may wish"), with the approaches of the said bridge, and that it "desires * * * to obtain from the Pacific Company the right to use its aforesaid drawbridge * * * as part of the Central Company's railway between said cities of Superior and Duluth;" and then the contract proceeds to grant these rights which the Central Company desired to obtain, and in paragraph 10 provides that the contract shall take effect on January 1, 1909, "whether [the Central Company] then uses the bridge or not, and shall continue twenty-five years." In view of these recitals, and the plain and unambiguous provisions of the contract, we fail to see how it can be doubted that it was the intention of the parties to this agreement to make a binding contract, and not a merely provisional one.

But it may be noted that the contract (Exhibit B) entered into some months later, and which granted the Central Company the right to use a certain piece of track just to the east of the bridge, contains the same provision as to when it shall take effect, whether the track is then used by the Central Company or not, and the same date, January 1, 1909, is fixed upon. Does this not show that these two contracts were intended to complete the Central Company's plans for extending its line between Superior and Duluth, and that, but for the intervening acquisition by the Soo Company of the rights and properties of the Central Company, there never would, in all probability, have been any contention, at least on the part of the Central Company, that this contract (Exhibit A) was not final, absolute, and binding? We hold that this contract was intended as, and is, a contract between these parties, and not a merely provisional agreement or understanding.

Such being the case, and this agreement having been held otherwise valid, the conclusion necessarily follows that the Central Com-

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pany must be held to the obligations assumed thereby. As was said by Mr. Justice Brewer, in Chicago, R. I. & P. Ry. Co. v. Union Pacific Ry. Co. (C. C.) 47 Fed. 15, 30: "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations, that no change of interest or change of management can disturb their sanctity or break their force, but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

The judgment must be modified, by adding thereto the amount due on the contract referred to in the record as Exhibit A, and the cause be remanded, with direction to the trial court to proceed in accordance with this conclusion.

So ordered.

FRANKLIN W. MERRITT v. JAMES T. JOYCE and Others.[1]

April 19, 1912.

Nos. 17,334—(24).

Option to buy — extension — waiver.

The mere fact that the owner of land here, who has within this state given an option to sell, conveys the same during the life of the option to a resident of an adjoining state, whose residence and place of business therein is readily ascertained and easily accessible, does not extend the time within which the option must be exercised, nor waive the tender of the purchase price within the stated time.

Joint owners of option — trust.

If two or more are joint owners of an option to purchase land, and jointly interested in the venture of exploring it for mineral deposits and exercising the option to purchase the land if such deposits are found, each of such joint owners sustains a confidential and fiduciary relation to the others

[1] Reported in 135 N. W. 820.

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so jointly interested in the common venture, so that, if one of them obtains the title to the land within the time of the option, upon payment of a less sum than stated in the option, and with intention to defraud the others of their rights, and such others refrain from protecting the option by tender on his false assurance that the title was taken and is held in trust for them, equity will impress a trust in their favor upon the land.

Evidence.

The evidence examined, and *held* to be such that it was error to dismiss the action without making findings of fact and conclusions of law.

Action in the district court for Crow Wing county against James T. Joyce, John McAlpine and John C. Campbell to determine what consideration was paid for the real estate mentioned in the opinion by defendant Joyce; what, if any, right he or the other defendants had therein and to determine that plaintiff was the owner of an undivided one-third of the premises, that defendant Joyce held title to an undivided one-third interest in trust for plaintiff, and plaintiff was owner thereof free and clear of any right, title or interest of either of the defendants. The amended complaint alleged the facts set out in the first two paragraphs of the opinion.

The separate answer of defendant Joyce admitted the making of the agreement between Andrew Aune and plaintiff and of that between plaintiff and defendant Campbell, by which Campbell agreed to purchase an undivided one-third interest in that contract, and of that between plaintiff and defendant McAlpine by which the latter agreed to purchase an undivided one-third interest in the Aune contract; admitted the conveyance of the property by Aune to the answering defendant, and that the latter claimed to be the owner of the land. It further alleged that plaintiff abandoned all of the privileges referred to in the agreement with Aune long prior to October 7, 1907, and never attempted to avail himself thereof.

The defendants McAlpine and Campbell demurred to the amended complaint.

The case was tried before McClenahan, J., who, at the close of the plaintiff's case, granted the motion of each of the defendants for a dismissal of the action. From an order denying plaintiff's motion

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for a new trial as to each defendant separately, and as to all defendants jointly, he appealed. Reversed.

Kerr & Fowler, for appellant.

Harris Richardson and *Harold C. Kerr,* for respondents.

HOLT, J.

On December 6, 1905, Andrew Aune, the owner of an eighty-acre tract in Crow Wing county, Minnesota, upon receiving $500, gave plaintiff a contract under which explorations for iron ore might be made on the land for a period of twenty-two months following, and within that time he had the privilege of purchasing the same upon payment of an additional sum of $7,500. Within fifteen days after demand Aune was to furnish an abstract of title to the land, and plaintiff was to have fifteen days, after receipt thereof, within which to examine the same and pay the purchase money. This contract was duly recorded December 7, 1905. On March 14, 1906, plaintiff assigned to each of the defendants Campbell and McAlpine an undivided one-third interest in the Aune contract, and they each assumed and agreed to pay one-third of the purchase price if the land was bought, and bound themselves in equal proportion with plaintiff to perform the obligations of the Aune contract. These assignments were recorded June 23, 1906.

On October 27, 1906, one J. O. Stetson obtained for $5 an option to purchase the land from Aune for $30 per acre. He subjoined an assignment to the defendant Joyce, which he acknowledged and recorded November 1, 1906, and on the same date a quitclaim deed was obtained from Aune to Joyce for the stated consideration of $2,400, but the actual consideration, $2,200, was paid by the defendant Campbell. This deed was recorded November 2, 1906. On November 15, 1906, Joyce quitclaimed an undivided one-fourth to Campbell and a like amount to one John A. Root; but these quitclaim deeds were not of record when this action was begun. The deeds, however, were delivered to McAlpine about December 20, 1906, when Joyce also turned over to McAlpine two drafts, for $750 each, to pay for the one-half interest in the land retained by Joyce.

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These drafts were payable to McAlpine's order, and were paid December 31, 1906. Aune left for Canada soon after making the deed, and has never returned to the state. Root has always resided in Pennsylvania, and Joyce in Eau Claire, Wisconsin.

Plaintiff brought this action on the theory that he and Campbell and McAlpine were mutually interested in the joint venture of exploring for iron ore and securing title to lands in which ore might be found; that the defendants Campbell and McAlpine conspired with the defendant Joyce to deprive plaintiff of his interest in the Aune land, and that the Stetson option and its assignment to Joyce, as well as the conveyance to him, were all done in pursuance of such plan; that plaintiff suffered his option to expire on the false assurance of McAlpine and Campbell that Joyce held the title in trust and the interest of plaintiff was protected; and plaintiff claims that he is entitled to have the court decree that Joyce holds one-third of the land in trust to be conveyed to plaintiff upon payment of such sum as the court may determine to be proper.

The defendant McAlpine disclaims any interest in the property, Campbell claims to own an undivided one-fourth, and Joyce an undivided one-half. None admit that plaintiff is entitled to any interest in the land or any relief.

At the close of plaintiff's testimony, upon separate motions made, each of the defendants was dismissed, and no findings made. A motion for a new trial being denied, plaintiff appeals.

Plaintiff contends that as a matter of law the Aune option had not expired when this action was brought, and no tender was required before bringing suit, for the reason that at no time since Aune left was there anyone in the state from whom to demand abstract of title or to whom payment could be tendered. If this be true, plaintiff is entitled to specific performance, regardless of the existence of the conspiracy, fraud, or fiduciary relation upon which relief is predicated in the complaint. It has been held that where an executory contract for the sale of lands has been entered into in the state where the land is, and subsequent thereto the vendor leaves the state, the vendee is not bound to seek out the vendor in another

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country or distant state to make tender of the purchase price when due, in order to maintain an action for specific performance. Gill v. Bradley, 21 Minn. 15, and cases there cited. Nor can a debtor in a contract to pay money, entered into in one state, be placed in default by failure to make tender of payment, if at the time payment is to be made the creditor resides in another state, although the general rule is that it is the duty of the debtor to seek out and tender payment to the creditor. Hale v. Patton, 60 N. Y. 233, 19 Am. Rep. 168.

But plaintiff's contract with Aune is neither an agreement for the sale of lands nor an obligation to pay money. It is an option, giving no interest or estate in the land until plaintiff or his assigns choose to avail themselves of the right given by demanding the abstract and tendering the price. Equity is powerless to convert the option into a contract to convey, unless by the act of the option holder an interest in the land is created. Ordinarily time is of the essence of an option. Still it may well be conceded that the time of tender is waived or prolonged, where the giver of the option, to avoid its being consummated in a sale, secretes himself, or goes to distant states or countries, so that it becomes impossible or impracticable for the holder, by tender of performance, to vitalize the option into a contract which equity will enforce. But that is not this case.

The option, by its terms, binds the assigns of the parties; hence a sale by either party may be said to have been within their contemplation. Plaintiff knew of the conveyance to Joyce many months before the option expired, and also that McAlpine and Campbell, in all probability, knew and could inform him of Joyce's whereabouts; but he made no inquiry. During all the time Joyce was a resident of Eau Claire, Wisconsin, there engaged in business. Eau Claire is almost as accessible to Minneapolis, where plaintiff appears to have been a good part of the time, as is the land where Aune lived before deeding it. There is no evidence of any effort on the part of plaintiff to find the record owner of the land within the time of the option, or of any attempt on the part of Joyce to conceal him-

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self. The omission in the deed from Aune to state the place of residence of the grantee is of too slight import to indicate an attempt to avoid tender being made. And we hold that the mere fact that the owner of the land, who has executed in this state to another an option, giving the right to purchase, within a time stated, before the expiration of that time, conveys to a nonresident, whose place of business and abode is readily ascertained and easily accessible, is no valid excuse for the failure to make the election to exercise the right conferred within the time stated by tender of the price. Therefore, on the first option contract, standing alone, plaintiff is entitled to no relief.

This conclusion does not, however, dispose of this appeal. When plaintiff assigned to McAlpine and Campbell each an undivided one-third interest in his option, they each became equally interested in the joint venture of seeking for mineral deposits on the land, and, if found in sufficient quantity and value, to secure the same by acquiring title to the land. From this situation confidential and fiduciary relations arose between the parties, so that each was bound to act in reference to the rights of the others in the common venture with the utmost good faith. Had plaintiff, within the time stated in the option, paid $2,200 for the land, taken the deed to himself, or caused it to be made to another, and, when McAlpine and Campbell ascertained that fact, they refrained from making a tender under the option, upon his representations that the title was taken and held in trust for their benefit, it seems clear that equity would afford a remedy, and decree that the purchase of the fee inured to the benefit of all three. This common venture was to seek mineral deposits, and, if they concluded that such existed of sufficient value, to secure the land. They were all equally interested in accomplishing the desired result at the lowest cost. If plaintiff could not by deception mislead McAlpine and Campbell to their injury in the option, neither will the law permit them to practice deceit to the destruction of plaintiff's right therein. Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547. And in Henderson v. Murray, 108 Minn. 76, 121 N. W. 214, 133 Am. St. 412, the court says:

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"Where, however, a party obtains the legal title to land by fraud or bad faith, or by taking advantage of confidential or fiduciary relations, or in any other unconscientious manner, so that he cannot justly retain the property, equity will impress a constructive trust upon it in favor of the party who is equitably entitled to it."

In addition to the facts hereinbefore set out, there was testimony tending to show that McAlpine, Campbell, and plaintiff, before and during the time in question, were jointly interested in obtaining options upon lands in the so-called iron ore ranges of Minnesota containing anticipated mineral deposits, exploring the same, securing title if they found evidence of ore of satisfactory quantity and value, and the leasing thereof to mining companies; that during part of the time Stetson was employed as a cruiser or explorer by McAlpine; that McAlpine was a close friend and business associate of the defendant Joyce; that Stetson had personally met Joyce but once before he obtained the option from Aune; that J. A. Root was known to none but McAlpine; that before Stetson got the Aune option he consulted with Campbell, and probably with McAlpine. When Stetson bargained for the land he had $200 cash in his pocket, not his own, and he could not tell whose it was. This he held onto as his compensation, jewing Aune down that amount, and obtaining from Campbell the whole amount that Aune received. Although Joyce claims to be the purchaser through Stetson, he, without question, pays $1,500 for one-half interest on a $2,200 deal. McAlpine claims he had known J. A. Root for some six years; that he had spoken to the latter about mineral lands in Minnesota, but not about this land, or the price at which it could be bought; that in December, 1906, or January, 1907, Root, at Erie, Pennsylvania, turned over $750 in currency to buy land with; but McAlpine is unable to tell to whom this money was paid, or anything more about the deal.

Aune was paid by Campbell's draft or check on November 1, 1906, but not until December 20, 1906, did Joyce pay the $1,500, and then to McAlpine by drafts payable to McAlpine's order. McAlpine does not know who received this money from these drafts which were paid December 31, 1906. Campbell surmises that he

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got back three-fourths of the $2,200 he paid. McAlpine seems to have paid one-half the taxes for at least one year after the conveyance.

There is also testimony that, when plaintiff was informed of the fact of the deed from Aune to Joyce, shortly after its record, he inquired of McAlpine and Campbell what it meant, and they assured him that his interest was protected, and he would receive a deed to the same. This also appears from the testimony of their attorney. In cases where deceit and underhanded doings are the charge, if it be true, it is generally found difficult of proof, especially by direct evidence. Hence inferences of great weight may be drawn from the conduct of the adverse parties and the ease with which their memories fail them when called by the opposite side for cross-examination.

In a case where a plain issue of fact is presented to a court, trying the case without a jury, and where, upon the determination of such fact against a plaintiff, the legal conclusion is unquestionable that no recovery is permissible, it may be true that it should be assumed that, when the court dismisses the action on defendant's motion at the close of plaintiff's case, the court, in effect, by granting the motion, determines the fact at issue against plaintiff. But in the case at bar the determination of the ultimate facts necessarily depends on a number of independent facts and inferences to be drawn therefrom, and also upon legal principles the applicability of which to the facts found may be open to dispute. The court may have been of the opinion that the facts were substantially proven as plaintiff contends, except as to one matter, and this was mistakenly considered vital to his case, when in truth it was not. If a mistake of this kind be made by the trial court in dismissing an action, when plaintiff rests, without findings, it will be impossible in many cases to reach the error on appeal, if it is to be held that the trial court determined on a motion to dismiss that the evidence presented by plaintiff was not true or sufficient to the extent that a recovery could be based thereon.

The true rule is stated in Herrick v. Barnes, 78 Minn. 475, 81

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N. W. 526, thus: "A trial court, whether the trial be with or without a jury, cannot rightly dismiss an action without a verdict or findings of fact, on the ground that the plaintiff has failed to establish a cause of action, unless the evidence is such that it would not sustain a verdict or finding for the plaintiff. It is not sufficient that the evidence would sustain a verdict or finding for the defendant. It must be such as to require, as a matter of law, a verdict or finding against the plaintiff. Tharalson v. Wyman, 58 Minn. 233, 59 N. W. 1009. It therefore follows that the court erred in so dismissing this action, unless the evidence, as a matter of law, required such a finding."

We have given the evidence in this case attentive consideration, and conclude that under the rule above announced it was error to dismiss the action when plaintiff rested. In view of a new trial, it is not proper for us to pass our judgment upon the weight of the evidence introduced, or attempt to draw inferences therefrom, further than has been done by the résumé set out above.

Order reversed.

CARRIE SIMONSON v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

April 19, 1912.

Nos. 17,378—(31).

Negligence — contributory negligence.

In this action to recover for the death of plaintiff's intestate, claimed to have been caused by the negligence of defendant, it is *held:*

1. Whether defendant was negligent was on the evidence a question for the jury.

2. It does not conclusively appear from the evidence that plaintiff's intestate was guilty of contributory negligence.

[1] Reported in 135 N. W. 745.

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Action in the district court for Ramsey county by the administratrix of the estate of Ole C. Simonson, deceased, to recover $5,085 for the death of her intestate. The case was tried before Kelly, J., who denied defendant's motion for an instructed verdict, and a jury which returned a verdict in favor of plaintiff for $2,500. Defendant's motion to set aside the verdict and for judgment notwithstanding the verdict was granted. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed with directions to enter judgment for plaintiff on the verdict.

Samuel A. Anderson and *A. F. Storey,* for appellant.

M. D. Munn and *J. L. Erdall,* for respondent.

BUNN, J.

This is an action brought by plaintiff, as administratrix of the estate of Ole C. Simonson, deceased, to recover damages for his death, alleged to have been caused by defendant's negligence. The answer denied negligence on defendant's part, and alleged that Simonson was guilty of contributory negligence. The issues were tried and submitted to the jury, and a verdict for $2,500 in favor of plaintiff returned. The trial court granted defendant's motion for judgment notwithstanding the verdict, and plaintiff appealed from the judgment entered pursuant to such order.

The questions before us are whether it conclusively appeared either that defendant was not negligent or that plaintiff was guilty of contributory negligence.

It is conceded that Simonson was killed by being struck by a passenger train of defendant at a crossing in the village of Kimball Prairie. Defendant's track runs east and west, and crosses Main street at right angles and on a level. The station is four hundred seventy two feet west of the crossing on the north side of the track. A house track runs from the station east, and across Main street fifty feet north of the main track. At the time of the accident there was a freight car standing on the house track, with its east end twenty feet west of the traveled part of the street. Simonson, on the afternoon of December 6, 1910, was seated in an empty wagon driving south-

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erly on Main street on his way home. He was seen approaching the crossing, when within twenty feet of the house track, and again after his team and wagon had crossed the house track. The train which struck him was running at a speed of sixty miles an hour from the west. It was two or three hours late. There is abundant evidence to justify a finding that no whistle was sounded, except a faint blast blown before the engine reached the station, and that no bell was rung. It is clear that, owing to the obstruction of the box car and other obstructions, Simonson could not see the train from any point until after he had passed the box car. This would be when his horses had crossed the house track and were within forty feet of the main track. Had he looked then, he could have seen a train as far west as the station; but the evidence is conflicting as to whether he would have a view past the station from this point, or until he was quite near the main track. The fireman, as the engine passed the station, saw the team and wagon. He testified that the hind wheels of the wagon were about going over the house track, and that the horses were nearly thirty feet from the main line.

1. As to the negligence of defendant, the great speed of the train and the absence of warning signals clearly made the question for the jury.

2. The learned trial court held that Simonson was guilty of contributory negligence as a matter of law. The basis of this conclusion was that when he entered the house track, with his team under perfect control, he could have seen the train approaching from the west for a distance of over five hundred fifty feet, and that to avoid the accident it was only necessary to stop his team. If the facts upon which the trial court's conclusion is based are conclusively shown by the evidence, the order granting judgment should be sustained. But does it conclusively appear that Simonson could see west for such a distance, when he emerged from behind the box car, that he would have seen the train, had he then looked, that his team was under perfect control, and that he could have stopped it after perceiving his danger?

We must apply the strong presumption that Simonson used due

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care. No witness testified that he did not look to the west the moment he had a view in that direction, and we must presume that he did. We think there is evidence to justify the jury in finding that he could not see beyond the station. If the train was then not in sight, it cannot be said that he was bound to wait or look again. He had no reason to expect a train at this hour that would crash through the village at sixty miles per hour without stopping at the station. If, on the contrary, the engine had passed the station, and he saw the train within four hundred seventy or four hundred feet of the crossing, and approaching at the rate of eighty feet or more per second, we think it should not be said as a matter of law that he was bound to find means to avoid the accident. It would take the train perhaps five or six seconds to reach the crossing.

There is evidence to show that the team was frightened, and that Simonson did not have them under control after they crossed the house track. The danger was so imminent, the time so short, that it seems too much to demand of Simonson the calm judgment and quick action necessary to save himself. It was for the jury, rather than for the court, to say whether he could have stopped his team. There is evidence tending to show that he tried to do so. The fireman testified that when he saw Simonson the horses were excited, and that, although he saw him at the first moment it was possible to do so, and he tried to attract his attention, "it was, of course, no use." Under all the circumstances shown by the evidence, we are of the opinion that it did not conclusively appear that Simonson could have escaped the collision by the exercise of reasonable care. It was a question for the jury, and judgment notwithstanding the verdict should not have been ordered.

Judgment reversed, with directions to enter judgment for plaintiff on the verdict.

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CHARLES BURMEISTER v. MINNIE GUST and Others.[1]

April 19, 1912.

Nos. 17,441—(38).

Will — appeal "by any party aggrieved."

Under R. L. §§ 3872, 3873, providing that an appeal may be taken from an order of the probate court admitting a will to probate, or denying the same, "by any party aggrieved," an executor, propounding a will by which he is nominated, may appeal from an order denying probate thereof.

Competency as witness to conversation.

An executor, propounding a will by which he is nominated, is not, as such, incompetent, under R. L. § 4663, to testify as to conversations with the testator concerning the will.

Refusal of request to charge.

Requested instruction as to admissibility of declarations of testator upon an issue of undue influence *held* properly refused, as being ambiguous and misleading.

Error in charge.

Instruction that certain facts and circumstances raised a presumption of undue influence in the execution of a will *held* erroneous.

Upon appeal to the district court for Cottonwood county from an order of the probate court of the county refusing to admit to probate a certain will of Fritz Bretzman, the matter was heard by L. S. Nelson, J., who submitted to a jury the question: Was the deceased induced or procured to sign the will by fraud, oppression or by the use of any undue influence? which they answered in the affirmative. The court made findings and affirmed the order and judgment of the probate court refusing to admit the will to probate. From an order denying the motion of Charles Burmeister, proponent, for a new trial, he appealed. Reversed.

Wilson Borst and *Ole J. Finstad,* for appellant.

D. A. Stuart and *J. G. Redding,* for respondents.

[1] Reported in 135 N. W. 980.

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PHILIP E. BROWN, J.

Fritz Bretzman, late of Cottonwood county, having no wife or children, died on January 3, 1911, aged seventy-four years, leaving what purported to be his last will and testament, which instrument was dated December 28, 1910, and therein, after making direction for the payment of debts and funeral expenses, bequeathed all of his property, which consisted entirely of personalty, to his two nieces, Emma Krueger and Emelia Burmeister, one-half to each of them, and appointed Charles Burmeister, the husband of the said Emelia Burmeister, this appellant, executor.

December 15, 1910, the said Bretzman had made another will, containing the same direction as to payment of debts and funeral expenses as the instrument above recited, but bequeathing to Emma Krueger $1,500, to Emelia Burmeister $500, to Minnie Gust $500, to Fred and William Bretzman and Augusta Graeling one dollar each, and providing that the rest of his estate should be equally divided between Emma Krueger, Minnie Gust and Emelia Burmeister, and nominating Emma Krueger and the said Charles Burmeister executors of the will. On January 7, 1911, the said Charles Burmeister presented the said alleged will of date December 28, 1910, to the probate court of the said county, and filed a petition therein in due form, praying that the said will be admitted to probate and that he be appointed executor thereof.

Thereafter, and prior to the hearing on the said petition, the said Fred and William Bretzman, Augusta Graeling, and Minnie Gust duly filed objections to the probate of said will, assigning as grounds therefor, among others, that the said will was obtained through fraud and undue influence. The said court, after a hearing, made its order disallowing the said will and refusing to admit the same to probate, whereupon the said executor therein named appealed from such order to the district court of the said county. On the trial of the said appeal the contestants waived all grounds of contest, except that the making of the purported will was obtained through fraud and undue influence, and upon the issue thus made a jury found for the contestants, and the court filed findings and affirmed

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the order refusing to admit the said will to probate. The proponent thereupon moved for a new trial, and from an order denying the same appealed to this court.

1. At the outset we are met with a motion to dismiss this appeal, on the ground that the executor had no right to appeal, either to the district court or to this court. The statute (R. L. 1905, § 3872) provides that an appeal may be taken from an order refusing to admit a will to probate "by any party aggrieved," and to the same effect is section 3873. But whether an executor, nominated by a will and offering the same for probate, is "aggrieved" by a denial of probate, seems never to have been passed upon in this state. Edgerly v. Alexander, 82 Minn. 96, 84 N. W. 653, In re Hardy, 35 Minn. 193, 28 N. W. 219, and Anderson v. County of Meeker, 46 Minn. 237, 48 N. W. 1022, cited by the contestants, do not pass on this point. It behooves us, therefore, first to look to the status of an executor with reference to the will nominating him, before we take up the question of his right to appeal. The statute (R. L. 1905, § 3675) expressly authorizes him to offer the will for probate, and to this extent, at least, makes him the "champion of the will." The language of the statute is that "any executor, devisee, or legatee named in a will, or any other person interested," may offer the same for probate. When, therefore, an executor offers a will for probate, he necessarily has some status with reference to the matter before the court, and the question is: What is that status?

In Wills v. Spraggins, 3 Grat. (Va.) 555, it was held that the rejection of a paper propounded as a will by the nominated executor was conclusive upon an infant legatee, who was not a party to the proceedings; such conclusion being based upon the representative character of the executor. Baldwin, J., in delivering the opinion of the court, says, at page 569, speaking of the executor: "He is the representative of the will, and of all interests created by it, and, moreover, the legal owner of the testator's personal estate. It is therefore his right and his duty to obtain for the instrument the sanction prescribed by law." Again, at page 575, he says: "He is

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the champion of the common cause, and charged to keep the lists against all antagonists."

Similarly, in Rong v. Haller, 106 Minn. 454, 119 N. W. 405, it was held that, under the circumstances shown by the record in that case, a notice of appeal from the probate court, given to the executor, was sufficient: Jaggard, J., saying (at page 457), that the executor was the "sole champion of the will." See also Shirley v. Healds, 34 N. H. 407; Ward v. Brown, 53 W. Va. 227, 44 S. E. 488.

It would seem, therefore, that, even in the absence of precedent squarely in point, we would have to hold that the executor, as the champion of the will, has the right to appeal from an order denying probate of the same. The statute, as we have seen, gives the right of appeal to anyone "aggrieved." R. L. 1905, §§ 3872, 3873. That portion of the latter section expressly providing that the representative of a decedent may appeal from an order relative to the allowance or disallowance of claims against the estate is intended to provide for an appeal where the representative fails to appeal, rather than to limit his right to appeal as one "aggrieved."

But we are not without precedents from other states to aid us. In Shirley v. Healds, supra, it was held that the executor named in the will was entitled to appeal from an order denying probate thereof. "He," the executor, said the court, at page 412, [34 N. H.] "is not only the sole trustee for all persons having an interest under the will, but he is the only legal representative of the estate of the deceased. As such, it is his duty to cause the will to be proved, and he is aggrieved in his rights and in his property by any decree which divests him of his title in the estate of the deceased under the will."

In the case of Matter of Stapelton, 71 App. Div. 1, 75 N. Y. Supp. 657, it was held that the executor named in the instrument propounded as a will was "aggrieved" by the denial of probate and this case was squarely followed in the cases of In re Rayner's Will, 93 App. Div. 114, 87 N. Y. Supp. 23, and In re Eckler's Estate, 126 App. Div. 199, 110 N. Y. Supp. 650. In Ward v. Brown, supra, it is held that an executor may propound the will and appeal from an order denying probate thereof. In this case the court re-

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views the cases cited against such right, and shows their inapplicability, and adverts to the failure of the respondents to cite a single case denying such right.

In Green v. Blackwell, 32 N. J. Eq. 768, holding that an executor, representing the interests of persons not otherwise represented, may appeal from a decree injuriously affecting their interests, the court says, at page 772: "Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made * * * is aggrieved, and therefore may appeal." In Smith v. Sherman, 4 Cush (Mass.) 408, it was held that an administrator appointed in another state upon the estate of a person there deceased might appeal from an order of the probate court in Massachusetts appointing an administrator there. At page 411 the court says: "A party is held aggrieved, whose rights and interests are necessarily affected by the decree. * * * And this is equally true, whether the rights to be affected are those which the party has in a personal or representative capacity." See also Whisler v. Whisler, 162 Ind. 136, 143, 67 N. E. 984, 70 N. E. 152.

In the light of these authorities, against which we have found none to the contrary, we hold that Charles Burmeister had the right to appeal from the order of the probate court denying probate of the said will of Fritz Bretzman, and likewise had the right to appeal to this court from the order of the district court made upon the appeal from the probate court. It may be noted, in this connection, that the very absence of later authorities upon the question under consideration would seem to indicate that the executor's right to appeal in a case like this is very generally accepted without question. At least such seems to be the case in this state. See Tobin v. Haack, 79 Minn. 101, 81 N. W. 758. See also Sheeran v. Sheeran, 96 Minn. 484, 105 N. W. 677, where it was held that the administratrix of an heir at law might, as such administratrix, appeal from an order admitting the ancestor's will to probate. At page 487, the court says: "It was within the line of appellant's duty as special administratrix to take an appeal from the order for the purpose of preserving the estate."

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It seems, furthermore, that if the same can be done by any fair construction of the statute, such consequences as followed in the case of Wills v. Spraggins, supra, should be avoided, at least to the extent of allowing the executor the right of appeal, and thus to secure an adjudication from all the courts to which the matter in due course may be taken, before the interests of those whom he represents are forever foreclosed.

We have examined the points made by the respondents concerning the alleged insufficiency of the notice of appeal and of the assignments of error, and we find neither well taken. The motion to dismiss this appeal is denied.

2. Coming, now, to the merits of the appeal, we think it is not necessary to make any extended review of the evidence in the case. The substance of the contestants' claims on the trial in the district court was that at the time of the making of the said will of date December 28, 1910, the testator was very ill, that he was under the control of the appellant, that he was induced by the appellant to revoke the former will of date December 15, 1910, and that the appellant had the will in controversy prepared by an attorney in the absence of the testator, and advised the said attorney how such will should be written, and that such attorney prepared the will as appellant directed; that appellant took certain persons to the testator to act as witnesses to the will, and refused to permit the relatives of the deceased to enter the house while the said will was being executed; and that after the execution of the will the appellant failed to make known to such relatives the fact of its execution, prior to the death of the testator, though he had frequent opportunities so to do.

To establish the said claims the said Charles Burmeister was called for cross-examination, under the statute, by the contestants, and his testimony thus invoked tended to establish the contestants' claims. But when the proponent's counsel sought to prove by such witness certain conversations between him and the deceased concerning what he wished to do with his property and the making of the will, numerous questions being asked such witness by said counsel to this end, the contestants objected, on the ground that the witness,

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being a party to the action, was not competent to testify to conversations with the deceased concerning the matter in controversy, and that the witness was incompetent under R. L. 1905, § 4663. The court sustained these objections, and its ruling is here assigned as error.

We think this assignment is well taken. In Gerachty v. Kilroy, 103 Minn. 286, 114 N. W. 838, the court, following its prior decisions to the same effect, disposed of a similar objection as follows, its opinion being delivered by Chief Justice Start:

"Nor was the attesting witness, who was named as executor in the will, rendered incompetent to testify to what took place when the will was executed, including what the testator said touching its execution, by R. L. § 4663, which provides that: 'It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party.' The proceeding to establish the will was one in rem, and the executor was not a party to the action, within the meaning of the statute; for the disability of the statute does not extend to all parties to the record, but only to such as are parties to the specific issue to which the testimony relates. Nor was the executor disqualified as a person having an interest in the event of such action; for the disqualifying interest must be some pecuniary, legal, certain, and immediate interest in the event of the cause itself. Whether the witness would ever be appointed executor, or, if appointed, whether he would ever receive any pecuniary benefit therefrom, was neither certain nor immediate."

We think this disposes of the contestants' contention that the said Charles Burmeister was incompetent to testify to the said conversations with the deceased, including their contention that such executor's liability for costs which might be imposed upon him made him an interested party. We hold, therefore, that the court erred in refusing to allow the said Burmeister to answer the said questions put to him by proponent's counsel in this regard. That the exclusion of this evidence was prejudical is apparent, in view of the char-

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acter of the testimony already elicited from the witness by the contestants.

3. The appellant assigns as error the refusal of the court to give the following instruction: "You are instructed that, in order that the contestants may prevail in this case, there are two facts that must be proven by them: First, that undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. Both of these facts must be proven by the contestants by the weight of the evidence in order to defeat the will. Upon the latter question, evidence of the statements of the testator, made either before the will was made or after, and which tend to throw light on his condition of mind, are admissible; but, as to the first question, the evidence of such statements is hearsay and incompetent, and should not be considered by you. Such declarations have been admitted only for the purpose of proving the condition of the mind of the testator. They afford no substantive proof of undue influence, and cannot be admitted for such purpose, and before the contestant can recover it is necessary that she should prove that undue influence was in fact actually exerted upon the testator, by other evidence than his own declaration."

It is undoubtedly true that the declarations of the testator are not evidence of undue influence, and cannot be used to establish that fact. In re Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 665; Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348. The instruction requested, however, is in form misleading and ambiguous, and, we think, too involved to enlighten the jury. The court, therefore, did not err in refusing to give it in the form offered.

4. The court gave, among others, the following instruction: "I instruct you that frequent calling upon the testator by the large beneficiaries, or their husbands, or either of them, at or about the time of the making of the will, coupled with the activity on the part of either of them in and about the execution of the will, such as the initiation of the proceedings for the preparation of the will, or participation in such preparation, employing draughtsman, selecting the witnesses, excluding other persons from the testator at or about

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the time of the execution of the will, concealing the making of the will after it was made, and the like, will raise a presumption of undue influence." To the giving of this instruction the appellant duly excepted, and assigns the same as error. The giving of this instruction was prejudicial error. Aside from any other faults it may have, it advised the jury that undue influence would be "presumed" from facts and circumstances which, at most, constituted mere evidence to be considered on such issue.

In the case of In re Hess' Will, supra, the court, at page 511, [48 Minn.] says: "It is not enough that there be motive and opportunity, * * * but the influence must be exercised and take effect, so as to destroy the free agency of the testator." The instruction above quoted, not only allowed, but practically directed, the jury to find the existence of undue influence from evidence which, alone, fell short of the proof necessary to establish such fact. Under the evidence in this case, the instruction practically amounted to a direction to find the issue in favor of the contestants.

The appellant has various assignments of error which have not been referred to herein. These assignments were neither urged in his points and authorities nor upon the oral argument, and hence are waived. Dunnell, Minn. Digest, § 366.

Order reversed.

ALFRED NELSON v. HENRY HALVORSON and Another.[1]

April 19, 1912.

Nos. 17,497—(66).

Punitive damages — case followed.

McCarthy v. Niskern, 22 Minn. 90, followed, to the effect that in an action

[1] Reported in 135 N. W. 818.

[Note] Liability of officer for making an arrest, see note in 51 L.R.A. 193.

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for a tort, where it may be proper to award punitive damages, evidence of a defendant's financial standing is admissible.

False imprisonment — arrest by officer.

In an action for false imprisonment against a constable, a defense may be made out if the officer proves that he had probable ground for believing the person arrested guilty of a felony, although when he made the arrest he mistakenly believed he had a warrant therefor.

Punitive damages — different penalties.

When two or more persons are made defendants in an action for tort, and the evidence is such that the jury may be justified in assessing punitive damages against one and not against the others, or if such damages may be assessed against all, still there is such difference in their financial ability or in the malice which actuated them that the jury may properly fix different penalties, it is error to instruct that the verdict against all must be in the same amount.

Evidence.

The erroneous instruction *held* not prejudicial to one of the defendants in this case. Also, *held*, that the offer by such defendant to prove justification was incomplete, and that he could not have been prejudiced by the refusal of an offer to show certain facts in mitigation of damages.

Action in the district court for Lac qui Parle county to recover $5,000 for false imprisonment. The case was tried before Qvale, J., and a jury which returned a verdict in favor of plaintiff for $500. From an order denying their motion for a new trial, defendants Ness and Halvorson took separate appeals. Reversed as to Halvorson. Affirmed as to Ness.

A. W. Ewing and *H. O. Halvorson,* for appellants.

J. H. Driscoll, for respondent.

Holt, J.

Plaintiff sued Henry Halvorson, a constable, and Louis Ness, a merchant, of Dawson, Minnesota, for false imprisonment, and recovered a verdict against both defendants for $500. Each defendant appeals from an order denying their separate motions for a new trial.

The complaint is the usual one for false imprisonment. The de-

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fendants answered separately, and admitted the arrest without warrant.

Halvorson alleged that he had reasonable grounds to believe that plaintiff had committed a felony, stating these, and also that he acted under a supposed warrant, but that as soon as he ascertained the invalidity thereof, and the unwillingness of the owners of the money alleged to have been embezzled by plaintiff to make a complaint against him, plaintiff was released.

The defendant Ness alleged that he acted on the advice of counsel, and, ignorant of legal proceedings, believed that an unsigned writ of attachment made out by his attorney authorized plaintiff's detention, and he also alleged facts showing the commission of a felony by plaintiff, namely, that one Logeland, Ness, and his brother were owners of some potatoes, which plaintiff, prior to December 6, 1910, had, as their servant, sold and collected the money for; that plaintiff, after collecting the money, had unlawfully converted $68 thereof to his own use with intent to deprive the owners of the same, and had refused to pay it over after demand.

The evidence developed that in the forenoon of the day mentioned a dispute arose between plaintiff and the owners of the potatoes as to the proceeds, and, the defendant Ness and Logeland having determined that plaintiff ought to be arrested, Ness went to his attorney, one Christianson, to cause the required documents to be made out, and Logeland sought the constable, Halvorson, and told him of the potato deal, and that plaintiff had embezzled the money and was about to leave the town, and requested the officer to be at the depot ready to apprehend plaintiff as soon as Ness could procure the warrant for the arrest from Christianson. No warrant was obtained. Instead, Christianson made out a writ of attachment for a justice to issue. Ness, not having time to get the justice to sign it, as the train had in the meantime arrived and was about to leave with plaintiff on board, rushed up to Halvorson with the blank writ and told him to get plaintiff. Halvorson took the paper, believing it to be a warrant, ran for the train, and made the arrest. After plaintiff got off the train, all went to the attorney's office. There, the con-

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stable claims, as soon as he discovered that the paper was not a warrant, plaintiff was informed that he was not under arrest. Plaintiff claims that, although he was not put under restraint, he was told that he could go with Logeland, if he would vouch for him to remain in Dawson till the next day. He also states that the attorney threatened to get a search warrant for his person, and he told them that it was not necessary, that he would submit to a search without, and that thereupon Ness told him to empty his pockets, which he did, and Ness examined his pocketbook, but returned it intact.

The errors assigned relate to the reception of evidence as to the financial standing of defendant Halvorson; the exclusion of evidence to prove that plaintiff had committed a felony; the court's ruling that there was no justification for the arrest on the part of the officer, even if he had probable cause to believe that plaintiff was guilty; the court's instruction to the jury that, in case they found that punitive damages should be assessed against Ness, a verdict must be rendered against the constable for a like amount; and, finally, that the verdict is excessive.

In a case where a jury may assess damages by way of punishment, a defendant's financial condition is proper for consideration, and consequently evidence showing such condition is admissible. McCarthy v. Niskern, 22 Minn. 90. If the jury believed that Halvorson, in making the arrest, did not act in good faith, or that, after he ascertained that he had no warrant, he took part in restraining plaintiff of his liberty, by placing him in the custody of Logeland, and aided in the so-called search, then the infliction of punishment by increased damages might properly rest in their discretion.

It is insisted that as to both defendants the court erred in excluding the offer to show that plaintiff had embezzled funds of his employers. A private person, when sued for false imprisonment, may plead and prove in justification that the party arrested had committed a felony; but a peace officer making the arrest, when so sued, need plead and prove no more in justification than reasonable ground for believing that the person arrested was guilty of a felony. Sections 5229 and 5232, R. L. 1905.

In Cochran v. Toher, 14 Minn. 293 (385), peace officers made

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arrest without a warrant, and the court says: "The inquiry in this case is not as to whether a felony was actually committed in Illinois, and that the plaintiff actually committed it and escaped from the jail in that state, but whether the defendants had reasonable ground to believe that such were facts." In McCarthy v. De Armit, 99 Pa. St. 63, the court says: "A peace officer, who arrests one upon reasonable suspicion of felony, will be excused, even though it appears afterwards that in fact no felony had been committed." Diers v. Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. 598, and see note in Leger v. Warren, 51 L.R.A. 193.

Although Halvorson testified that he relied on the paper handed him by Ness being a warrant, and would not have made the arrest but for that, his caution in not acting till he thought he had legal authority should not preclude him from making the defense of reasonable cause for the arrest on a charge of felony, if in fact it be true. If the officer had reasonable and probable cause for believing that plaintiff, when arrested, had committed a felony, and he released plaintiff as soon as he ascertained that it was not true, he was not liable to plaintiff, even in nominal damages, and the court was in error when he limited the evidence of the officer's reasonable ground of belief in plaintiff's guilt of a felony to mitigation of damages. If true, it was a complete justification and defense.

The court also erred in instructing the jury that the verdict against the defendants must be in the same amount as to damages. It is true that, where two or more join in committing a tort they are equally liable. The actual damages from an unlawful act may not be mitigated, strictly speaking, by showing absence of actual malice. But the rule as to punitive damages is that good faith and a proper purpose shown either lessens or avoids them. From the evidence the jury might have found that the constable made the arrest in good faith, supposing he had a warrant, but immediately released plaintiff upon discovering that the document he acted under was not a warrant. If so, the jury would not be justified in assessing punitive damages against the officer, even if they found that he had not probable ground for believing plaintiff guilty of a felony, while at

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the same time the jury might find from the evidence that Ness knowingly made use of pretended process to force plaintiff to settle a disputed claim, and that he and his attorney pursued this purpose, after the officer ceased to act, thus warranting the jury in assessing substantial punitive damages against Ness.

The difference in financial condition of the two defendants would alone justify the jury in imposing different amounts as punishment upon them, in case the conclusion was reached that both ought to be penalized. Ness admitted he was worth not less than $7,000, while the value of the officer's possessions, above debts, was less than one-third of that sum. The practice of rendering verdicts against the several defendants in an action in different amounts, where their participation in the wrong sought to be redressed has not been the same in kind or motive, is not unknown in this state. Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236.

The errors pointed out necessarily lead to a reversal of the order on the appeal of defendant Halvorson.

But we are of opinion that as to defendant Ness no prejudice could have resulted from the erroneous instruction that the verdict must be the same against both, because in no view of the case can it be conceived that the jury would be inclined to look upon Halvorson as the more culpable. The inference is irresistible that the instruction could have no other effect than a tendency to help Ness. It is true that the answer of Ness properly pleaded justification; but, when counsel offered to prove that plaintiff had committed the felony pleaded as excuse for the arrest, he failed to offer to prove one essential element, namely, that plaintiff had refused, after demand, to turn over the money he, as servant or agent, had collected upon the sale of the potatoes. It is a close question whether or not the court rightly excluded the evidence offered by Ness in mitigation of damages, to the effect that he misunderstood the advice of his attorney, and believed the blank writ of attachment gave a right to arrest plaintiff. Where punitive damages are involved, the court should admit all evidence which bears on the absence of actual malice as well as on its presence. And in this case it would have been

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well to have admitted the version of both parties concerning the facts out of which the arrest arose.

But Ness is not in a position to urge with much force that the ruling challenged was prejudicial. He was a business man. He sought his attorney's advice. He could hardly make it appear that the attorney counseled the arrest of plaintiff, because he knew the attorney made out an unsigned writ of attachment. He gave this paper to the officer, knowing it to be unsigned, saying it was a warrant, and demanding plaintiff's seizure. He went to his attorney's office with the constable. The justice was there; but no attempt was then made to swear out a criminal complaint, or to take any other legal proceeding to prosecute plaintiff for a crime. In short, the undisputed facts, viewed most favorably to Ness, show that he did not act in good faith in causing the arrest. Hence we conclude there was no prejudical error made by the court in excluding the evidence offered.

The damages are said to be excessive. They are liberal. However, the trial court approved the amount, and we are not able to say it is so large that passion and prejudice influenced the jury.

Upon the appeal of the defendant Henry Halvorson, the order is reversed, and a new trial granted; and upon the appeal of the defendant Louis Ness, the order is affirmed.

ADA MacKINNON v. CITY OF MINNEAPOLIS.[1]

April 19, 1912.

Nos. 17,500—(88).

New trial — misconduct of jurors.

An order denying a new trial for alleged misconduct of certain members of the jury in visiting the place of the accident, the subject-matter of the action, *held* not an abuse of discretion.

[1] Reported in 135 N. W. 814.

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Same.

The record affirmatively shows that the alleged misconduct of the jurors was without prejudice to either party.

Action in the district court for Hennepin county to recover $25,000 for personal injuries. The case was tried before Holt, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, she appealed. Affirmed.

Mead & Bryngelson, for appellant.

Daniel Fish and *John A. Dahl,* for respondent.

BROWN, J.

Action for personal injuries alleged to have been received by plaintiff from a defective sidewalk, in which defendant had a verdict, and plaintiff appealed from an order denying a new trial. Plaintiff moved for a new trial on the ground, among others, of misconduct of certain members of the jury, and whether the court erred in not granting the motion upon that ground is the only question presented on this appeal.

Plaintiff predicated her action upon the alleged negligence of defendant in permitting the sidewalk at the place of the accident to become out of repair; in consequence, she was injured. Subsequent to the injury the sidewalk was put in order and all evidence of any defect therein removed. During the trial of the action two of the jurors, without the knowledge or acquiescence of either party, visited the place of the accident for the purpose of discovering, if possible, facts to aid them in deciding the case, and one of them so reported to his fellow jurors. He did not, however, communicate to his associates any fact claimed by him to have been discovered.

Whether a new trial should be granted upon the ground of misconduct of the jury, particularly misconduct of the character of that here presented, rests in the discretion of the trial court, the exercise of which will be interfered with only when abused. In the case at bar the trial court held that the conduct of the jurors in visiting the place of the accident was without prejudice to plaintiff, and there-

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fore no ground for a new trial. We discover from the record no sufficient reason for disapproving that conclusion. The accident to plaintiff occurred in the nighttime. The visit of the jurors to the place thereof was in the daytime, and at a time when all evidence of the alleged defect had been removed. And though the action of the jurors probably amounted to misconduct, still nothing was disclosed to them by the visit to the place, either for or against the interests of plaintiff, and no prejudice resulted therefrom. We do not understand, from the record before us, that the trial court disposed of the motion upon the theory that plaintiff was bound affirmatively to show that she was materially prejudiced by the conduct of the jurors in visiting the place of the accident. On the contrary, it is clear that the court based its conclusion upon the showing made by both parties, and that therefrom it affirmatively appeared that no prejudice resulted. In other words, the conclusion of the court was that any presumption of prejudice arising from the prima facie misconduct of the jurors was fully overcome by the affidavits presented on the motion, in connection with the record and proceedings on the trial. In that conclusion we concur.

The question whether misconduct of the character of that here disclosed is ground for a new trial must be determined from the particular facts presented in each case. No general rule has ever been laid down by which all cases may be tested further than that actual prejudice must appear. Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187; Gude v. City of Mankato, 30 Minn. 256, 15 N. W. 175, and Floody v. Great Northern Ry. Co. 102 Minn. 81, 112 N. W. 875, 1081, 13 L.R.A.(N.S.) 1196, cited and relied upon by plaintiff, presented facts essentially different from those disclosed in the case at bar and are not in point. And though there was a conflict upon some points in the evidence in this case, it is clear that the visit of the jurors to the place of the accident did not aid them one way or the other in deciding upon the merits of the case.

Order affirmed.

HOLT, J. having tried the case below, took no part.

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J. FRANK LONGBOTHAM v. AL. RITCHIE and Another.[1]

April 19, 1912.

Nos. 17,508—(64).

Construction of bond.

The language of a bond construed, and *held:*

1. That it did not by its terms expire on a day stated.

2. That under its conditions, the surety was liable for the full amount of the bond.

Action in the district court for Ramsey county to recover $1,038 from defendant Ritchie under a contract and to recover $500 from defendant George E. Lennon under the bond mentioned in the opinion. The answer of defendant Lennon admitted the execution of the bond, alleged that no service of the action had been had on defendant Al. Ritchie, and that no determination, legal or otherwise, had been had as to the respective rights under the contract and no legal determination had been had as to any sums due plaintiff from defendant Ritchie through Ritchie's failure to perform. The reply alleged that the sheriff was unable to find Ritchie; that defendant Ritchie was not a resident of the state of Minnesota and that therefore no determination, legal or otherwise, could be had by further proceedings against defendant Ritchie, as to the respective rights under the contract, except such determination as may be had by trial of the cause of action alleged against defendant Lennon. The case was tried before Olin B. Lewis, J., who made findings and as conclusions of law ordered judgment in favor of plaintiff and against George E. Lennon for $500. From an order denying defendant Lennon's motion for a new trial, he appealed. Affirmed.

Thomas McDermott, for appellant.

James A. Peterson, Paul J. Thompson and *Adolphe C. Peterson,* for respondent.

[1] Reported in 135 N. W. 816.

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BUNN, J.

September 22, 1909, plaintiff and defendant Ritchie entered into a written contract, by the terms of which plaintiff agreed to deliver to Ritchie at the downtown ball park in St. Paul, on or before October 4, 1909, certain animals, performers, and other adjuncts of a circus, and to give performances there, or at any place Ritchie might direct, for a period of six months. Ritchie agreed to pay for the use of the show $300 per week, and also the cost of transportation and other expenses. The contract contained this recital: "The parties hereto have this day entered into a bond for $500, said bond to be surrendered on October 4, 1909, and second party to deposit with first party in lieu thereof the sum of $500 cash, which said sum is to be held and accepted by the first party in full of all transportation charges of said show and equipment to home quarters, either at termination of this contract by its expiration or termination in any other manner."

On the same day a bond was given to plaintiff, signed by Ritchie as principal and by defendant Lennon as surety, in the sum of $500, which bond was conditioned as follows:

"The condition of this obligation is such that whereas, the said principal has this day entered into a contract with the obligee for the furnishing of a certain show and the necessary equipment thereof, and has agreed to pay the sum of three hundred ($300.00) dollars per week for rental of said show and wages of persons furnished by said obligee in connection therewith, copy of which contract is attached and made a part thereof:

"Now, therefore, if said principal shall on each and every Sunday morning, commencing with the 10th day of October, 1909, and ending with the 3d day of April, 1910, pay said sum of three hundred ($300.00) dollars, then this obligation shall be void; otherwise, of full force and virtue."

The bond also contained the following clause, at the end, after the condition was recited:

"It is mutually agreed that this bond shall be surrendered by the obligee to the principal on October 4, 1909, after delivery of per-

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sonal property required to be furnished by the obligee under contract bearing even date; the principal depositing with him, in lieu thereof, the sum of five hundred ($500.00) dollars in cash, said sum to be held and accepted at termination of contract, whether at expiration of term or otherwise, in full of all transportation charges of said show and equipment."

Plaintiff delivered the animals, performers, and property at the time and place specified; but Ritchie did not, either then or at any time, deposit with plaintiff the sum of $500, and the bond was never surrendered. Ritchie failed to make any of the payments provided by the contract, and finally disappeared, being indebted to plaintiff in the sum of $700 under his agreement to pay $300 per week, and in the sum of $238 for money paid by plaintiff for transportation charges.

This action was brought against Ritchie to recover for breach of his contract, and against defendant Lennon to recover on the bond. Ritchie was not served and did not appear. Defendant Lennon answered, and the trial resulted in a decision that plaintiff was entitled to judgment against defendant Lennon for the sum of $500, with interest. A motion of said defendant for a new trial was denied, and he appealed.

It is the contention of the defendant that the bond, by its terms, expired on October 4, 1909, prior to any breach of the contract. This position is based upon the language of the agreement, contained in the bond, that it "shall be surrendered by the obligee to the principal on October 4, 1909; * * * the principal depositing with him, in lieu thereof, the sum of five hundred ($500.00) dollars in cash." Looking to the entire instrument for the construction of this language, it is clear to us that the intention was merely to give the principal the option of depositing the cash in lieu of the bond. The condition is in plain language, and makes the bond of "full force and virtue" if the principal shall not pay each week the sum of $300. To adopt the construction contended for by defendant would be saying that the parties, in providing for a bond by their contract, and in its execution and delivery, intended that the bond

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should be surrendered before there could be a default in its conditions, and without anything in lieu of its security. This is unreasonable, and not justified by the language of the bond and the contract. If the $500 had been paid, the bond would have been no longer in force; but, as it was not paid, the liability of the principal and surety remained exactly as nominated in the bond.

Defendant also contends that, even if the bond remained in force after October 4, the utmost liability of the surety would be the amounts paid by plaintiff for transportation charges. This contention is founded on the language of the bond that the sum of $500, when deposited in lieu of the bond, shall "be held and accepted at termination of contract * * * in full of all transportation charges of said show and equipment." But this provision could only be applicable in case the $500 was paid. It was in no sense a condition of the bond, and has no bearing on the question of the intent of the parties in case the bond remained in force. We cannot disregard the plain language of the penal and condition clauses, and must hold that it was intended to secure the payment of $300 per week. In short, the bond was given, has not expired or been surrendered, and its conditions have been broken. The liability of surety is clear.

Order affirmed.

H. F. WOOD v. J. T. JOHNSON.[1]

April 19, 1912.

Nos. 17,518—(55).

Deed — agreement by grantee to pay mortgage.

It is the law of this state that a provision in a deed, whereby the grantee agrees with the grantor to assume and pay an outstanding mortgage on the property conveyed, creates no enforceable obligation, unless the grantor is

[1]Reported in 135 N. W. 746.

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personally liable to pay the debt; but, if the grantor is personally liable, the mortgagee or his assignee may enforce the obligation by action against the assuming grantee.

Personal liability of grantor.

Whether the grantor in such a deed is personally liable for the mortgage debt is to be determined according to the laws of the state where his contract was made. If such laws make the grantor personally liable, his grantee, who assumes and agrees to pay the mortgage, is liable, though such assumption agreement be made in this state.

Action by mortgagee — pleading foreign statute.

In an action by the mortgagee or his assignee in the courts of this state to enforce the assumption agreement made by such grantee, it is not necessary to plead the laws of another state, under which his grantor was liable for the debt. Such laws are merely evidentiary facts, as distinguished from issuable facts. Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, followed and applied.

Action in the district court for Clay county to recover $2,455.90 alleged to be due upon a judgment, mortgage note and mortgage. The case was tried before Taylor, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Christian G. Dosland, for appellant.

Edgar E. Sharp, for respondent.

Bunn, J.

R. B. Ballard was the owner of a lot in Radcliffe, Iowa, and in January, 1905, executed to H. A. Miller his note for $5,000, secured by a mortgage on the property. The note contains the recital: "This note is secured by first mortgage vs. lot 12, block 5, Radcliffe, Iowa, and maker is relieved of all personal liability hereon."

Ballard resided in Iowa, and in June, 1905, conveyed the mortgaged premises to Murry A. Wood, also a resident of Iowa. In the deed Wood assumed and agreed to pay the mortgage. In July, 1905, Wood conveyed to Ed Rorem, also a resident of Iowa, and in the deed Rorem assumed and agreed to pay the mortgage. June 24,

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1907, Rorem deeded the property to defendant, who was and is a resident of Minnesota. In the deed defendant assumed and agreed to pay the mortgage.

In March, 1908, the then holder of the mortgage foreclosed by an action in the courts of Iowa. In this action judgment for the debt was rendered against Wood and Rorem, on their assumption agreements; but Johnson, defendant here, not being a resident of Iowa, was not personally served, and no judgment was entered against him. The mortgaged premises were sold under the decree for $3,125, leaving a deficiency of $2,415. In May, 1908, the right of action against Johnson arising from his assumption of the mortgage debt was assigned to plaintiff, who subsequently brought this action to recover the amount of the deficiency. Defendant answered, pleading that his assumption of the debt was without consideration, and also setting up fraud. A demurrer was sustained to that part of the answer which attempted to plead fraud, and defendant did not appeal from the order, or amend. The case was tried on the issues made by the pleadings, and resulted in findings of fact and conclusions of law in plaintiff's favor. Defendant moved for amended findings, but the motion was denied. The trial court also denied defendant's motion for a new trial, and defendant appealed from this order.

No questions of fraud or mistake are presented by the record. It appeared from the evidence that defendant and Rorem entered into a written contract in Minnesota by the terms of which Rorem agreed to sell to defendant the property in Radcliffe, Iowa, "free from any incumbrance, except a mortgage for $5,000," and defendant, in exchange, agreed to sell and convey to Rorem one hundred twenty acres of land in Clay county, Minnesota, "free from any incumbrance, except mortgages for $3,350."

The deed of the Radcliffe, Iowa, property was in pursuance of this contract, but, contrary to the terms of the contract, contained a clause by which the grantee assumed and agreed to pay the mortgage. Though this may have been done through fraud, the answer on which the case was tried did not make this issue, and the evidence

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is insufficient to make a case of more than a suspicion that defendant may have been a victim of sharp practices. The condition of the pleadings prevents relief on the ground of fraud or mistake, even if we could hold that the evidence was sufficient, and overlook defendant's retention of the deed for nearly a year after his discovery that it contained the assumption clause, without repudiating the instrument or taking steps to have it reformed. While defendant's plight appeals to our sympathy, we must determine the case solely on the record before us.

Defendant's contention in brief is that, because Ballard, the mortgagor, was not liable personally for the debt, the promise of his grantee to pay the mortgage did not create a right of action in the mortgagee, and that this applies to each succeeding promise made by the subsequent grantees. It is the settled law in this state that a third person, for whose benefit a contract is made, cannot enforce such promise, when there is no privity, by contract or otherwise, between the promisee and the beneficiary—no obligation or duty owing from the former to the third person giving the latter an equitable claim to the benefit of the promise. Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L.R.A.(N.S.) 492. Or, as stated in Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 39 Am. St. 618, "a stranger to a contract between others in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover."

This rule was applied in Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526, to a promise by the grantee of land to pay an outstanding mortgage for which the grantor was not personally liable, and it was held that such a promise could not be enforced. This is clearly the law in Minnesota, and is, we think, sound law; but the converse of the proposition is just as clearly settled and just as sound. Where there is a legal obligation on the part of the promisee to the third person, as where the grantor is personally liable to him for the payment of a mortgage, the third person may enforce the promise. In

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the case of an agreement by the grantee in a deed to pay an outstanding mortgage, the principle upon which the liability is based is that the promise forms a part of the consideration for the purchase, and relieves the grantor from a legal obligation to pay the debt himself. Kramer v. Gardner, supra; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Stariha v. Greenwood, 28 Minn. 521, 11 N. W. 76; Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429; Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333.

It follows, then, that if defendant's grantor, Rorem, was legally liable to pay the mortgage debt, defendant's promise can be enforced by the mortgagee or his assignee. It may be conceded that if the land were in Minnesota, and all the various assumption agreements were Minnesota contracts, Rorem's promise to pay the mortgage debt would not create any obligation on his part to the mortgagee, and therefore that defendant would not be liable. But the land was in Iowa, and the assumption agreement of Rorem was clearly an Iowa contract, as was the assumption agreement of his grantor. Under the law of Iowa, Rorem was liable for the mortgage debt, and an action could be maintained against him by the owner of the mortgage, regardless of whether his grantor was liable. Marble v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Clement v. Willett, 105 Minn. 267, 117 N. W. 491, 17 L.R.A.(N.S.) 1094, 127 Am. St. 562. It is not necessary to consider whether the promise of defendant was an Iowa or a Minnesota contract. Even if it be held that it was a Minnesota contract, his immediate grantor, Rorem, being liable, defendant's liability is clear under our laws.

The trial court admitted evidence of the common or decision law of Iowa over defendant's objection that such law had not been pleaded. This is claimed to be prejudicial error. This point might be disposed of without a decision of the question raised, as we would hesitate to reverse when the error could be so easily cured by an amendment to the complaint. But the question of the necessity for pleading the Iowa law must be decided adversely to defendant's contention. The complaint alleged that defendant assumed and agreed to pay the mortgage debt "as a part of the pur-

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chase money," and made a similar allegation as to each of the prior grantees. Whether this agreement was enforceable or not depended on whether defendants' immediate grantor was personally liable to pay the debt. Having pleaded the promise, both of defendant and of his grantor, plaintiff was entitled to introduce evidence of any facts tending to prove the facts pleaded. The rule that the laws of another state or country must be pleaded does not apply, when such laws consist of mere matters of evidence, when they are probative or evidential facts, as distinguished from issuable facts. Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. 536. We hold that it was not necessary to plead that under the Iowa decisions a grantee who agreed to pay an outstanding mortgage was liable to the owner of the mortgage, whether his immediate grantor was personally liable or not.

We find no other questions that require mention, and conclude that the order appealed from must be affirmed.

Order affirmed.

LOUISE FARRINGTON v. RAY G. FARRINGTON.[1]

April 19, 1912.

Nos. 17,530—(67).

Money loaned — complaint.

A complaint alleging that the defendant, at a certain time, had and received a sum of money from plaintiff, which he then agreed to repay to plaintiff upon demand, states a cause of action for money loaned, and not for money had and received.

Charge to jury.

The instructions to the jury examined, and found not prejudicial to defendant, in view of the issue made by the pleadings and evidence.

[1] Reported in 135 N. W. 815.

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Newly discovered evidence — new trial.

Misconstruction of a pleading by an attorney is no legal excuse for a failure to produce witnesses upon the trial, nor may the testimony of such witnesses be considered newly discovered evidence; the attorney all the time knowing its purport.

Action in the district court for Big Stone county to recover $441.85 for money loaned. In his answer defendant admitted that he received certain sums of money from plaintiff, but alleged that the accounts between them had been fully settled and paid. The reply was a general denial. The case was tried before Flaherty, J., and a jury which returned a verdict in favor of plaintiff for $494.81. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Cliff & Purcell, for appellant.

Rieke & Hamrum, for respondent.

Holt, J.

Defendant and plaintiff were at one time husband and wife. During their courtship defendant learned that plaintiff had some money to invest, and he, then eager to assist her, suggested the purchase of a note and mortgage drawing ten per cent interest on land owned by him in South Dakota. This was agreeable to her, and, the defendant being a lawyer, she, about January 11, 1901, turned over $350 (he claims only $300) to make the investment. Plaintiff claims that no part of that amount has been repaid to her, either of principal or interest, and, further, that when, on October 14, 1902, she gave a satisfaction of the mortgage to him, she loaned him the amount then due thereon upon his promise to repay upon demand. The defendant admits that she gave him $300, and no more, that it was invested in the note and mortgage, and that he repaid it in full, the last payment to her being made when the satisfaction was executed, being a few weeks before their marriage. The trial resulted in a verdict of $494.81. From an order denying a new trial, the defendant appeals.

Misconstruction of the pleadings, and consequent erroneous in-

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structions to the jury, an excessive verdict, and newly discovered evidence, are urged as grounds for reversal of the order. It is contended that the complaint is for money had and received, and not for money loaned. Some excuse is found for this contention by the unnecessary detail of the transaction set out in the complaint, and the irrelevant matters therein relating to the domestic difficulties of the parties. The gist of the complaint is contained in these words:

"That on or about the 18th day of April, 1904, the aforesaid loan of $350 was converted into cash, said loan now amounting to $441.85, including interest at the above rate, and said defendant had and received the sum of $441 from the plaintiff. * * * That, at the time the said defendant had and received said sum of money from plaintiff, defendant promised and agreed to repay said sum of money so had and received as aforesaid to plaintiff on demand thereafter by plaintiff."

To this defendant made answer that he "admits and alleges that at times other and different than as alleged in the complaint he did receive certain sums of money from plaintiff, but with respect thereto alleges that all accounts, loans, and transactions had between parties were thereafter in all things settled, paid, and adjusted."

We are of the opinion that the trial court rightly held the complaint to state a cause of action for money loaned to defendant.

The defendant admitted, when called for cross-examination, that he at one time received $300, which he invested in the mortgage on his land. Plaintiff contends that it was $350. Defendant was clearly apprised that plaintiff claimed the loan was made from the money due and received when this mortgage was paid; that the proceeds of the mortgage constituted the fund which defendant borrowed. His contention on the trial was that there never was a loan of the proceeds of the mortgage, because he had paid it in full to the plaintiff in small payments; the last being made to her when the satisfaction was given. If there was a loan of the proceeds of the mortgage, there is no claim by defendant that any part was ever paid. On the other hand, if it was paid to plaintiff at or prior to the giving of the satisfaction, there was no loan.

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Hence the court's instructions could not have prejudiced the defendant, though not technically correct, in perhaps permitting an inference that plaintiff's cause of action, namely, the loan, related back to the time the defendant received the money for investment in the mortgage. Nor is it apparent that any prejudice legally resulted from counsel being surprised at the court's construction of the pleading. If the defendant had paid no part of the mortgage at the time the satisfaction was given, he was then, when he received it, required to produce the money. She states the money was there, and that he got it. It does not seem important whether this be so or not. The money ought to have been there. If it was not, defendant had it; and if the parties considered it as there for defendant's use, plaintiff loaning it to defendant, and he agreeing to pay it back to her with interest, on demand, the transaction was a loan. Neither is there any materiality in the discrepancy of dates. The defendant could not have been misled, as appears from his examination.

In claiming that the verdict is larger than the evidence warrants, we think counsel overlook the fact that plaintiff testified that the defendant agreed to pay interest on the loan, and in the complaint interest is demanded from April 18, 1904. In view of the fact that on the testimony the jury might properly compute interest from the date of the loan, it can be readily demonstrated that the verdict is within the amount authorized. Defendant, on his own testimony, is not entitled to credit for the $25 he gave her to prepare for the wedding or to buy for the household.

On the alleged newly discovered evidence, defendant has no ground for a new trial. The admissions of plaintiff, alleged to be newly discovered evidence, were made to the proposed witnesses in defendant's presence, and we do not consider his misconstruction of the pleadings sufficient excuse for not calling the witnesses at the trial.

We find no merit in the appeal.

Order affirmed.

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HENDRICK DORFFI v. DULUTH, WINNIPEG & PACIFIC RAILROAD COMPANY.[1]

April 19, 1912.

Nos. 17,597—(52).

New trial — discretion of court.

An order granting a motion for a new trial, based on several grounds, expressly stated, as amended, that the order was made on the ground that the verdict was not justified by the evidence. *Held*, that the order was a discretionary one, so far as it granted a new trial on the ground specially mentioned, and, further, that the trial judge did not abuse his discretion in making the order.

Plaintiff appealed to the district court for St. Louis county from an award of damages, made in condemnation proceedings instituted by defendant company, for taking part of plaintiff's farm. The appeal was tried before Ensign, J., and a jury which returned a verdict in favor of plaintiff for $4,999.99. From an order granting defendant's motion for a new trial, plaintiff appealed. Affirmed.

John Jenswold, Jr., for appellant.

Washburn, Bailey & Mitchell, for respondent.

START, C. J.

The respondent instituted eminent domain proceedings to acquire a right of way for its line of railway over the farm of the appellant, consisting of 43.68 acres, situated seven and one-half miles from West Duluth. The amount of land actually taken was 1.63 acres. The appellant appealed from the award of damages made by the commissioners to the district court of the county of St. Louis. The result of a trial in the district court was a verdict assessing the appellant's damages in the sum of $4,999.99. Thereupon, upon motion

[1] Reported in 135 N. W. 529.

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of the respondent herein, the trial court made its order granting a new trial. This order, omitting the recitals, was in these words: "Ordered, that said verdict be and the same is hereby set aside and a new trial granted." No reason was assigned for making the order.

The appellant appealed from the order; but, before a return to this court, the trial court, on motion of the respondent and notice to the appellant, amended its order, so that, in the recitals in the original, the order, so far as here material, was in these words: "This case came on to be further heard * * * upon the motion of the defendant to set aside the verdict and grant a new trial herein upon the grounds that the damages assessed by the jury were excessive, that the verdict is not justified by the evidence, and for errors of law occurring at the trial and duly excepted to; * * * and the court being fully advised in the premises, it is ordered that said verdict be and the same is hereby set aside and a new trial granted." It is expressly stated that "this order is made on the ground that the verdict is not justified by the evidence, as well as upon the other grounds above set forth." The court also ordered that the amendment take effect as of the date of the original order.

It may be inferred from the return to this court that one of the grounds upon which a new trial was granted was that the verdict was not justified by the evidence, and that the amendment was intended to correct the omission in the order as originally made. The right of the court to amend its order so as to make it conform to the facts is unquestioned; but it is the contention of the appellant that the amendment as made did not change the effect of the original order, and that it cannot be sustained unless the record shows reversible errors of law, or, in other words, that the order as amended is not a discretionary one. The case of Hull v. Minneapolis, St. P. & Sault Ste. Marie Ry. Co. 116 Minn. 349, 133 N. W. 852, is relied upon in support of the claim.

The case is not here in point, for the reason that, although the language of the order granting a new trial in that case was somewhat involved, yet, as construed by the court, the order was not made on the ground that the verdict was not in fact justified by the evidence,

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but that as a matter of law circumstantial evidence tending to establish an essential fact in the case was not alone sufficient, but that direct evidence of the fact was necessary.

We are of the opinion that the order appealed from, as amended, clearly takes the case out of the proviso to subsection 7 of section 4198, R. L. 1905, and that in so far as it grants a new trial on the ground that the verdict was not justified by the evidence it is a discretionary order, within the rule of Hicks v. Stone, 13 Minn. 398 (434), and Nelson v. Mississippi & R. R. Boom Co. 99 Minn. 484, 109 N. W. 1118.

The appellant further contends that, if the order be regarded as a discretionary one, yet the verdict is so obviously and palpably supported by the great preponderance of the evidence that the trial court abused its discretion in granting a new trial. We have carefully considered the evidence, and reached the conclusion that the claim of the appellant is not justified by the record, and hold that the trial court did not abuse its discretion in the premises.

Order affirmed.

AMERICAN SEEDING MACHINE COMPANY v. C. J. HOLZBAUER and Another.[1]

April 26, 1912.

Nos. 17,426—(37).

Liability of partnership — question for jury.

H. & N., a copartnership, entered into an executory contract with M. & Co. for the purchase of certain grain drills. The drills were warranted by M. & Co. to be well made and capable of doing good work. There was a breach of the warranty, in that the drills were defective; but H. & N. failed to comply with the warranty as respects notice to M. & Co. Thereafter, and before settlement under the contract, N. retired from the copart-

[1] Reported in 135 N. W. 807.

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nership, and was succeeded by T. The new firm settled for the drills, giving their promissory note for the amount called for by the contract as the purchase price. The note was subsequently, but after maturity, transferred to plaintiff in this action. In this action to recover thereon, it is *held* that the question whether the new firm assumed the obligations of the old firm in respect to this contract, and the further question whether the settlement referred to was had under and pursuant to the original contract, or in consideration of a new and independent agreement on the part of M. & Co., to repair and put the drills in working order, and whether the promissory note was given solely in consideration of that agreement, were questions of fact, and that the evidence sustains the verdict.

Authority of agent.

It was within the implied power of the agent to make the special agreement, since it was incidental and necessary to the exercise of his actual authority.

Action in the district court for Clay county to recover $606.68 upon a promissory note. The case was tried before Nye, J., and a jury which returned a verdict in favor of defendants. From an order denying plaintiff's alternative motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Edgar E. Sharp and *A. C. Lacy,* for appellant.

E. E. Corliss, for respondents.

BROWN, J.

Action to recover upon a promissory note made and delivered by defendants to P. P. Mast & Co., and indorsed and transferred to plaintiff, in which defendants had a verdict, and plaintiff appealed from an order denying its alternative motion for judgment or a new trial.

The facts are as follows: Defendant Holzbauer and one Newman were copartners, engaged in the sale of farm machinery at Fergus Falls. On November 11, 1905, the firm ordered of P. P. Mast & Co., of Springfield, Ohio, the shipment and delivery to them of certain grain drills, for which they agreed to pay in the manner and at the time specified in the order. The order was taken by one Gus Eklow, a representative of Mast & Co., and forwarded to the com-

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pany at its home office, where it was formally accepted. Attached to the order was a written warranty to the effect that the machines were well made, of good material, and with proper management capable of doing first-class work. It further provided that, if the machine failed to do good work, written notice should be given the company and a reasonable opportunity afforded to remedy defects; and if the defects could not be remedied the machines should be returned and new ones furnished, or the notes or money paid thereon returned. The drills were shipped to Holzbauer & Newman pursuant to the order, and were received by them in due season. The evidence tends to show that the drills were defective, not in compliance with the warranty, and that the firm refused to accept them, and so notified the company. It is clear, however, that they did not comply with the terms of the warranty in respect to the things required by them to be done.

Thereafter, and some time during the spring of 1905, Newman retired from the copartnership, and was succeeded by defendant Tomhave; defendants having then entered into a copartnership agreement for the purpose of continuing the business of the old firm. Whether the new firm assumed the contracts and obligations of their predecessors, including the contract for the purchase of the drills in question, was a disputed question on the trial. In July, 1906, the agent of Mast & Co., who took the order from Holzbauer & Newman, called upon the new firm and demanded a settlement for the drills. Defendants insisted that the drills were defective, and not in compliance with the warranty under which they were sold to the old firm, and declined to settle or pay therefor unless Mast & Co. would contract and agree to put them in good working order. To effect a settlement the agent delivered to defendant a writing in the following language:

"Fergus Falls, July 26, 1906.

"We, the undersigned, P. P. Mast & Co., agree to C. J. Holzbauer & Co. to make the drills that are in my possession to do as good work as any other single disc drill and make satisfactory work. We also agree to send a man here in the season of 1907 to have the

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drills properly adjusted, and to exchange any defective parts for the season of 1907.

"P. P. Mast & Co.,
"By Gus Eklow."

Thereupon, and in consideration of that agreement, defendants made and delivered to the agent the promissory note upon which this action was brought; the amount thereof representing the purchase price of the drills. Mast & Co. subsequently, but after the maturity thereof, sold and transferred the note to plaintiff in this action.

Plaintiff brought the action to recover thereon, and defendants interposed in defense, among other things, the special agreement just mentioned, and the total failure of Mast & Co. to comply therewith; that the drills were defective and incapable of doing good work, and were worthless and of no value whatever. Defendants had a verdict, and plaintiff appealed from an order denying its alternative motion for judgment or a new trial.

The assignments of error relate principally to rulings of the court permitting defendants to show that the new firm did not assume the contract for the purchase of the drills, made with the old firm, and permitting evidence of the settlement with the agent of Mast & Co., as a result of which the special agreement to put the drills in order was made in consideration of the making and delivery of the note in suit. We have fully considered all these assignments, and discover no error justifying the new trial of the action. It was the theory of plaintiff's case that the new firm assumed the performance of the original contract, and, since the failure of defendants to comply therewith was conclusively shown, that plaintiff was entitled to recover; while defendants contended that the old contract was not assumed, and that the note in suit was made and delivered solely in consideration of the special agreement to repair the drills.

Our examination of the evidence leads to the conclusion that the question whether the new firm assumed the obligations of the original contract was one of fact, and properly submitted to the jury. It was so submitted under clear and fair instructions, and the evidence amply supports the verdict. It must be conceded that defendant

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Tomhave, having become a member of the firm after the contract had been entered into, could limit his liability in respect to the existing liabilities of the old firm. 30 Cyc. 614. And the testimony of both Holzbauer and Tomhave clearly shows that this contract was not assumed when the new firm was organized. While the evidence is not, perhaps, conclusive upon the subject, it was sufficient to take the question to the jury; and if the original contract was not assumed by the new firm, and the jury must have so found, it is immaterial that the terms thereof were not complied with.

Since, therefore, it was competent for defendants to show that the new firm was not liable on the old contract, because Tomhave, the new member thereof, had not assumed the same, it was clearly proper to show under what contract or agreement the settlement for the drills delivered to the old firm was made. In making the settlement Mast & Co. were dealing with a copartnership not liable under the original contract, and to bring about a settlement the agent made the special agreement referred to. Whether the agent had actual authority to make that agreement is not important, for it was in furtherance of the business he was transacting for his principal, and therefore within this implied authority. The agent was authorized to effect a settlement for the drills, and his implied authority included all things necessary and proper to bring about that result. Larson v. Minneapolis Threshing Machine Co. 92 Minn. 62, 99 N. W. 623, and Avery Planter Co. v. Peck, 80 Minn. 519, 83 N. W. 455, 1083, are not in point.

Plaintiff, having purchased the note after its maturity, is in no better position than Mast & Co. would have been had they brought the action. Our conclusions, therefore, are that the issues in the case were properly submitted to the jury. The evidence sustains the verdict, and no reversible errors were committed on the trial.

Order affirmed.

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BREEN STONE COMPANY v. W. F. T. BUSHNELL COMPANY.[1]

April 26, 1912.

Nos. 17,465—(44).

Contract construed.

Contract to furnish cut stone as per plans and specifications for certain buildings construed, and *held* not to include a provision of such plans and specifications that the contractor must secure the architect's certificate of performance as a condition precedent to the right to demand payment.

Same — waiver by acceptance and use.

Such contract construed, and *held* to be in the nature of an executory contract of sale upon condition precedent, so that acceptance and use of the stone waived all nonconformity thereof to plans and specifications known to the owner prior to such acceptance and use.

Severance of damages.

Defendant, not having, either by its pleadings or its proof, attempted to sever the damages flowing from such previously known nonconformity from those flowing from subsequently discovered nonconformity, *held* not entitled to any recovery by way of recoupment for the latter.

Action in the district court for Ramsey county to recover $368.01, balance alleged to be due upon the purchase price of certain cut stone. The substance of the pleadings is given in the opinion (page 286). The case was tried before Dickson, J., and a jury which returned a verdict in favor of plaintiff for $355.37. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

O'Brien, Young & Stone and *Taubman & Williamson,* for appellant.

A. E. Boyesen and *H. H. Flor,* for respondent.

Philip E. Brown, J.

In 1910, the defendant erected a building in Aberdeen, South Da-

[1] Reported in 135 N. W. 993.

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kota, known as the Dakota Farmer Building; the plans and specifications therefor being prepared by Ellerbe & Round, a firm of architects of St. Paul, Minnesota, and the construction work being done by the Lepper Construction Company, under the supervision of one Arnold, the latter having been employed by the defendant to superintend such construction. On June 21, 1910, the plaintiff wrote the said Ellerbe & Round as follows: "We will furnish all the cut stone for the new Dakota Farmer Building at Aberdeen, South Dakota, the same to be cut according to plans and specifications and ready to set in building, and delivered f. o. b. cars Aberdeen, South Dakota, for the sum of thirty-eight hundred dollars ($3,800.00) out of Bedford stone."

On June 9, 1910, the defendant wrote the plaintiff as follows: "I have before me your letter of June 2d, addressed to Ellerbe & Round, Architects, St. Paul, Minnesota, offering to furnish cut stone according to plans and specifications for the new Dakota Farmer Building at Aberdeen for the sum of $3,800.00 f. o. b. Aberdeen. I beg to advise that we wish to accept this proposition, and just as soon as Mr. Ellerbe can prepare you a set of plans he will send them to you. Mr. Ellerbe informs us that you are in position to get out the work very promptly, and, of course, this acceptance is subject to that understanding."

To this the plaintiff replied, under date of June 10 as follows: "We have your letter of June 9th, awarding us the contract for the cut stone for the new Dakota Farmer Building at Aberdeen, according to plans and specifications by Ellerbe & Round, for the sum of $3,800.00, f. o. b. cars Aberdeen, for which we wish to thank you." The balance of this letter was devoted to the matter of the time it would take to get the stone out, and closed with an assurance that the plaintiff could arrange to get the stone out as fast as the contractor would need it.

The plans and specifications referred to in this correspondence provided, among other things, as follows:

"32. Cut Stone. All window sills, main entrance, including columns, bases, caps, lintels, moulded jambs, entabulatures, steps, and

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balustrades; the base up to the water table, water table, and cornice with moulded medallions, and carved letters, and window casings on the main front and two sides returns, and wherever stone is indicated on plans and sections shall all be composed of the best quality blue Bedford stone of uniform color and hardness, free from sand holes and rust, and cut so as to lay on its natural bed and set in the wall. All stone shall be worked in accordance with the detail drawings, with true surfaces and sharp angles and straight lines. All sills shall be cut with lugs, and all sills and projecting courses shall be carefully fitted together at joints and no joint to exceed $^{3}/_{16}$" in width. All stone to have a bearing on the wall of at least 5", and in all cases 1–3 more than its projections. No patching to be allowed. All exposed surfaces to be rubbed to a uniform smooth surface."

As to payments, paragraph 11 of these plans and specifications provided: "Payments will only be made upon certificate of the architect and in accordance with the terms of the contract. No payments made on account of work during its progress and no prior inspection shall be construed as an acceptance of the work executed by the contractor. * * *"

And in the preliminary specifications it is provided: "Where the word 'contractor' occurs in this specification, it shall be taken to mean the person, firm, or corporation, who has entered into contract with the owner for that portion of the work referred to in the particular section or paragraph of the specification wherein the work occurs."

Paragraph 5 refers to the drawings, and makes it the duty of the contractor to notify the architects in the event of mistakes, omissions, etc., in the drawings, and of anything necessary to a clear understanding of the work to be done, or of errors as to "instruments furnished or in work done by other contractors."

Pursuant to the agreement above set forth, the plaintiff proceeded to furnish the stone called for thereby, and prior to the bringing of this action delivered f. o. b. cars at Aberdeen all the stone contracted by it to be delivered, all of which stone was unloaded and

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used in the said building by the said Lepper Construction Company; and prior to such use the defendant, its architects, and its superintendent knew that practically all of the stone which the defendant thereafter claimed to be defective and not in accordance with the said plans and specifications did not so comply with such plans and specifications; that is, substantially all the alleged defects and shortcomings of the stone were known by the defendant before the stone was used.

The plaintiff brought this action to recover an alleged balance of the purchase price of the said stone of $368.01, and alleged in its complaint, in substance, the making of a contract with the defendant for the delivery of the said stone, the delivery of the stone, the payment by the defendant of $3,431.99 on the purchase price thereof, and the indebtedness of the defendant for a balance of $368.01.

The defendant, in its answer, admitted the making of the contract, the alleged payment on account thereof, and then, by way of defense, alleged that the plaintiff had neglected to comply with the plans and specifications, and had failed to obtain a certificate from the architects that the material furnished by the plaintiff complied with such plans and specifications, and that certain unnecessary delay occurred in the furnishing of the stone, to the damage of the defendant in the sum of $500. And, further answering, the defendant, by way of defense and counterclaim, alleged the failure of the plaintiff to comply with the terms of the contract, to the damage of the defendant in the sum of $500, and demanded judgment against the plaintiff in the sum of $131.99. The plaintiff's reply denied the allegations of the answer. The plaintiff had a verdict for $355.37, and this appeal is from an order denying the defendant's alternative motion for a judgment notwithstanding the verdict or for a new trial.

1. The correspondence of the parties above set out, and so much of the plans and specifications as may, by reference, be deemed to be incorporated therein, constitutes the sole expression of their agreement, and, standing alone, it is questionable whether such correspondence shows that the minds of the parties ever met in contrac-

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tual compact. However, the pleadings concede the existence of an express contract, and these letters, as above stated, constitute the sole expression thereof, and the intent of the parties must be sought therefrom.

It is unquestionably true, as contended by the defendant, that if the contract contemplated that the plaintiff should procure the architects' certificate as a condition precedent to the right to demand payment, then the plaintiff was not entitled to a verdict in this action; for it is admitted that the plaintiff procured no such certificate. The plans and specifications referred to are too voluminous to set out herein in full; but we are satisfied, from a careful consideration thereof, that paragraph 11, above quoted, has no application to this case. We think that the plans and specifications contemplated the letting of the construction of the said building as an entirety, or at least contemplated construction work, and hence that the said paragraph 11 was not intended to apply to one merely furnishing material. In any event it does not appear that the minds of the parties to this action ever met upon anything except that the plaintiff should furnish, for a certain price, certain stone, which was to conform to the said plans and specifications in the matter of quality, cutting, etc. We hold, therefore, that no certificate of the architect was necessary in this case. The practical construction which the parties placed upon their contract likewise confirms this view.

2. The next claim of the defendant involves the main question in the case. It claims that, notwithstanding its acceptance and use of all of the stone furnished by the plaintiff, the latter was nevertheless bound to prove substantial performance of the contract, and that the court erred in its various instructions, in that such instructions placed upon the defendant the burden of proving the plaintiff's failure substantially to perform the contract and the damage to the defendant therefrom, and in that such instructions practically eliminated the defendant's right to counterclaim for damages.

We think, however, that the defendant's contentions in this connection are based upon an erroneous theory of the case, to wit, that the contract in controversy is a technical building contract, upon

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which the plaintiff is entitled to recover only under the doctrine of substantial performance. If this theory were correct, it may be that the instructions of the court were erroneous, and it may be that the said instructions were given upon this theory. But, be that as it may, in our view of the case the contract for the furnishing of this stone was not a building contract, but was, at least so far as the rights of the parties herein involved are concerned, an executory contract of sale upon condition precedent; and if, upon this theory of the case, the conclusion arrived at by the jury was correct, any error in the instructions is manifestly harmless.

Indeed, in our view of the case, the instructions were more favorable to the defendant than it was entitled to, for they allowed it to recoup its damages, if it proved that the plaintiff did not substantially perform its contract, notwithstanding that the evidence conclusively showed that the greater portion of the defendant's damage, if any, must have flowed from defects and shortcomings in the stone which were known to the defendant before it used the stone; whereas, the contract being, as we have indicated, an executory contract of sale upon condition precedent, the defendant was entitled, at the most, to recover only for defects not discovered until after acceptance and use for which as such there is no claim made either in the pleadings or proof.

It may be that such a contract as this may, as to latent defects not discovered or discoverable until after the material has been placed in the building, be deemed to be in the nature of a building contract, as distinguished from a sale on inspection. See Utah v. James, 25 Utah, 434, 71 Pac. 986. But certainly, as regards the effect of acceptance and use of the material after knowledge of its failure to comply with the plans and specifications, we do not think the analogy applies. See Wheaton v. Lund, 61 Minn. 94, 63 N. W. 251; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Talbot v. Gorman, 103 Mich. 403, 61 N. W. 655, 27 L.R.A. 96; Wisconsin Red Pressed Brick Co. v. Hood, 54 Minn. 543, 56 N. W. 165.

The only possible view upon which the defendant in this case could be allowed damages for defects in the stone known to it before ac-

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ceptance and use would be upon an implied warranty that the stone was fit for the purpose, known to the plaintiff, for which it was intended (see Breen v. Moran, supra), or upon an express warranty (see Wheaton v. Lund, supra). But such a recovery is precluded in this case by the fact that the stone was to be and was cut and furnished pursuant to definite plans and specifications furnished by the defendant, out of which arose no warranty, either express or implied, but only a condition precedent to acceptance, which condition necessarily became inoperative upon acceptance. Thompson v. Libby, 35 Minn. 443, 29 N. W. 150; Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Wisconsin Red Pressed Brick Co. v. Hood, supra; Talbot v. Gorman, supra; Brown v. Baird, 5 Okla. 133, 48 Pac. 180; Gaylord v. Allen, 53 N. Y. 515. In Schwartz v. Church of the Holy Cross, 60 Minn. 183, 62 N. W. 266, the court, while holding that mere temporary use of an altar set up in the defendant's church by the plaintiff did not show such acceptance as required a verdict relieving the defendant from payment therefor, nevertheless propounded the law as follows:

"The law is quite strict in holding that, if an article is not according to contract, the vendee must exercise the right of rejection within a reasonable time, and as acts speak louder than words, it is undoubtedly true that if, after inspection, the vendee uses the property in a way in which he would have no right to use it unless he was owner of it, such use will, as a general rule, be deemed an acceptance, however much he may protest in words that he does not and will not accept."

In Ashland v. Shores, 105 Wis. 122, 81 N. W. 136, the law is laid down as follows: "Where property is delivered by one person to another, as fulfilling an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with the contract within a reasonable time after a fair opportunity to inspect it, an acceptance will be inferred." This case involved a technical building contract, and yet the court applied the rule as stated and the same rule was applied to a building contract in Siebert v. Roth, 118 Wis. 250, 95

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N. W. 118; it being held in both of these cases that the owner could not, after acceptance, counterclaim for damages for defects discovered or readily discoverable before acceptance. See also Marine Iron Co. v. Wiess, 148 Fed. 145, 78 C. C. A. 279.

We do not deem it necessary, however, to subscribe to this extension of the rule to technical building contracts, as we have already held that the contract in this case is not such. If the plaintiff had contracted to lay the stone in the building, the case might have been different. See Walstrom v. Oliver-Watts, 161 Ala. 608, 50 South. 46. But not having done so, and having contracted merely to deliver the stone f. o. b. cars at Aberdeen, we think it is clear that the contract is one of sale, as distinguished from a building contract, with the consequence that defendant cannot recover for defects and shortcomings of the stone known by it before acceptance and use of the stone. And as upon the trial there was no severance of damages in the proof with reference to defects known before acceptance and use and those developing or becoming apparent thereafter, we do not think the defendant is entitled to anything by way of recoupment or counterclaim, other than as allowed for delay by the trial court on the stipulation of the parties.

Order affirmed.

HERMAN MUELLER v. SUPERVISORS OF TOWN OF COURTLAND.[1]

April 26, 1912.

Nos. 17,468—(49).

Highway — notice of appeal — evidence.

The requirement of R. L. 1905, § 1188, that where an appeal is taken from the decision of a town board in the matter of laying out a road, etc., a copy of the notice of the appeal shall be filed with the town clerk of each

[1] Reported in 135 N. W. 996.

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town through which the road involved runs, is jurisdictional; but, since no provision is made as to how such filing must be proved, the appellant, when jurisdiction of an appeal is challenged for lack of such filing, may show the same by extraneous evidence.

Same.

The order of receiving the proofs in such cases rests in the sound discretion of the court, and there was no abuse of such discretion in receiving such proofs on the trial to the jury.

Same.

Evidence to the effect that a copy of the notice was delivered to the town clerk at his home in the town whereof he was clerk, and that he placed it with the other papers in the case, where it remained until the said papers were delivered to his successor, *held* sufficient to sustain the district court's finding that such copy was in fact filed, though it was not indorsed by the town clerk as having been filed.

Assessment of damages.

Upon an appeal to the district court from the refusal of a town board to lay out a public cartway, the determination of the damages incident to the establishment of such way is not involved; and where the determination of the town board is reversed, it will be for such board, under the verdict and the judgment entered thereon, to assess the damages and open the way.

Public and private use.

The fact that a proposed public cartway is solely for the purpose of furnishing ingress to and egress from the premises of a single landowner, and is to be located entirely over and upon the premises of another, is not so conclusive of the private and against the public character of such way as necessarily to render the taking of the property necessary for such way a taking of private property for private use.

Verdict — evidence.

Evidence considered, and *held*, following Minneapolis & St. L. R. Co. v. Village of Hartland, 85 Minn. 76, not so indisputably conclusive against the verdict of the jury, ordering a cartway to be laid out, as to justify this court in disturbing such verdict.

Petitioners for a public cartway appealed to the district court for Nicollet county from an order of the supervisors of the town of Courtland denying their petition. The appeal was tried before Olsen, J., and a jury which returned a verdict in favor of Herman Mueller that the action of the supervisors refusing to lay out the cart-

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way in question be reversed and the cartway laid out as described in the petition. From an order denying the supervisors' motion for a new trial, they appealed. Affirmed.

Albert Pfaender, George T. Olsen and *W. L. Comstock,* for appellants.

Albert Steinhauser, for respondent.

PHILIP E. BROWN, J.

The respondent, with others, duly petitioned, under R. L. 1905, § 1181, and Laws 1905, p. 85, c. 66, the supervisors of the town of Courtland, appellants, to lay out a public cartway. The said supervisors denied the said petition, and the petitioner appealed to the district court, seeking an entire reversal of the determination of the supervisors, and praying that the said cartway be ordered laid out and damages awarded. On the preliminary call of the calendar in the district court the supervisors moved to dismiss the appeal for lack of jurisdiction, which motion the court denied, and during the subsequent trial to a jury permitted the petitioner, over the objection and exception of the supervisors, to introduce evidence tending to show the filing of a copy of the notice of appeal with the town clerk. The jury returned a verdict reversing the action of the supervisors in refusing to lay out the said cartway, and directing therein that it be laid out as described in the petition therefor. This is an appeal by the supervisors from an order denying their motion for a new trial.

1. The first contention of the supervisors is their claim that the district court had no jurisdiction, because it appeared that no copy of the notice of appeal thereto was filed with the town clerk, and incidentally that the court erred in denying their motion to dismiss the appeal on this ground on the preliminary call of the calendar, and also in allowing the petitioner to offer evidence, during the progress of the trial, tending to prove that such notice had been filed. These contentions cannot be sustained.

R. L. 1905, § 1188, directs that a copy of the notice of appeal shall be filed with the clerk of each town in which a proposed road

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may be located, and this provision is jurisdictional. Hagemeyer v. Board of Commrs. of Wright County, 71 Minn. 42, 73 N. W. 628. However, if a copy of the notice has actually been filed with the clerk, the fact that proof of such filing has not been filed with the clerk of the district court would not be ground for dismissing the appeal. The statute does not require proof of such filing to be filed, and the jurisdiction of the district court rests upon the fact of the filing with the town clerk, and not upon the mode of proof thereof. Hence, where jurisdiction is questioned on this ground, the appellant has the right to furnish proof of the filing of the notice as required by the statute. Town of Haven v. Orton, 37 Minn. 445, 35 N. W. 264; Hagemeyer v. Board of Commrs. of Wright County, supra. The order of receiving proof rests in the sound discretion of the court, and neither prejudice nor abuse of such discretion is here shown in the matter of the hearing the proofs concerning the filing of the notice of appeal.

The next question for determination on this branch of the case is whether there was sufficient evidence to justify the court in holding, as it did, that a copy of the notice of appeal was filed with the town clerk; there being no claim but that such filing, if in fact made, was timely. It conclusively appears that a copy of the notice was delivered to the town clerk at his home in the town whereof he was clerk, that he placed it with the other papers in this road case, and that it remained therewith until he delivered the files to his successor. The notice was not indorsed by him as having been filed; his reason for his failure to so indorse it, as testified by him, being that the chairman of the town board told him not to file such notice. We think that the determination of the district court in this regard should not be disturbed.

The appellant relies upon Runyon v. Alton, 78 Minn. 31, 80 N. W. 836; but that case is not in point. See Rosaaen v. Hammer, 101 Minn. 317, 112 N. W. 267. In the instant case it appears that the notice reached the office of the town clerk in due time, and was in fact deposited by him with the other official papers and records in

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the case; and hence the case is ruled by Burkleo v. Town Board of Baytown, 108 Minn. 224, 120 N. W. 526, 121 N. W. 874.

In the appellants' fourth assignment of error they complain of the reception on the trial to the jury of evidence of the filing of the notice of appeal, and contend that the question of such filing, being one to be decided by the court, should not have been allowed to go to the jury, and that the court's action in this regard tended to confuse the issues. But it clearly appears that this question was not submitted to the jury, but was decided by the court; and the instructions given by the court were strictly confined to the proper issues and were abundantly sufficient to clear up any confusion that might otherwise have resulted from the reception of this evidence on the trial.

2. The appellants' twelfth assignment of error is, in effect, that the court erred in refusing to submit to the jury the question of damages incident to the establishment of the proposed cartway. A sufficient answer to this assignment is that there was no request for any instruction submitting such question. However, the determination of the damages was not involved in the appeal to the district court, and under the verdict and judgment to be entered thereon it will be for the town board to open the cartway and to assess the said damages.

3. This brings us to the main question in the case. The appellants contend, in effect, that the cartway in question, being wholly upon the lands of one person and solely for the benefit of another, the latter, moreover, already having access to a public road, is essentially a private way, and hence that they, the board of supervisors, have no power to establish it. Or, in the appellants' own language: "It is the contention of the appellants that there is no public necessity for the establishment of the proposed cartway." And at the first glance it would seem that this contention is well founded, in that it appears as a matter of fact that this cartway is solely for the purpose of furnishing ingress to and egress from the farm of petitioner, Herman Mueller, and is to be located entirely over and upon the land of one Henry Mueller, and, furthermore,

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that Herman Mueller already has access to a public highway. In other words, regarding this matter solely from the viewpoint of Hermann Mueller, it may, perhaps, be said that the proposed cartway is solely for his convenience, and that, such being the case, the taking of Henry Mueller's property for such cartway would be a taking for private use. This view is not without authority to sustain it. See Richards v. Wolf, 82 Iowa, 358, 47 N. W. 1044, 31 Am. St. 501, cited by the appellants; and see, also, the cases collated in the note to Zircle v. Southern (102 Va. 17) 102 Am. St. 805, at page 826, et seq.

On the other hand, when a road like the one in question is regarded from the public's viewpoint, it would seem that the mere immediate convenience thereof to the person most directly benefited thereby, as distinguished from the public at large, is not conclusive of its private and against its public character, so as to render the taking of another's property therefor a taking for a private use; for the public undoubtedly has an interest, in too many ways to recite, in having access to each and every one of the members thereof. In this view, the only difference between the road involved in this case and one that would serve two or three or more private property owners, becomes one of degree, and not one of kind. This is the view we take, and we think it is supported by the weight of both reason and authority. See Zircle v. Southern, 102 Va. 17, 45 S. E. 802, and note thereto in 102 Am. St. 826; Fanning v. Gilliland, 37 Ore. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. 758; Denham v. County Commrs. 108 Mass. 202; County v. Raymond, 139 Cal. 128, 72 Pac. 915.

In Stewart v. Great Northern Ry. Co. 65 Minn. 515, 517, 68 N. W. 208, 33 L.R.A. 427, Chief Justice Start defines a public use as "any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities." In Sherman v. Buick, 32 Cal. 242, 254, 91 Am. Dec. 577, Sanderson, J., says: "Whether a way be public or private does not depend upon the number of people who use it, but upon the fact that every one may lawfully use it who has occasion"

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—language which is quoted and approved in County v. Raymond, supra. In Butte v. Montana, 16 Mont. 504, 41 Pac. 232, 31 L.R.A. 298, 50 Am. St. 508, Hunt, J., says: "The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised."

Holding, then, in line with the above authorities, that the cartway involved in this case may be established without necessarily violating the constitutional inhibition against taking private property for a private use, the question to be determined resolves itself into one of the sufficiency of the evidence to sustain the verdict of the jury ordering the said cartway to be laid out, and thus declaring in favor of the public necessity thereof; and the rule upon which we must proceed in this connection, as reiterated by Brown, J., in Minneapolis & St. L. R. Co. v. Village of Hartland, 85 Minn. 76, 79, 88 N. W. 423, is that "such verdict should be set aside only upon its appearing that the evidence is indisputably conclusive against it." What, then, are the main facts upon which this verdict was based? They are well stated in the trial court's memorandum which we find in the record, substantially as follows:

The petitioner, Herman Mueller, owns a farm situated east of and near to the city of New Ulm. His buildings are situated on the top of the bluffs of the Minnesota river; the river and the bluffs being to the west of the buildings, and between the buildings and the said city. A public highway runs east and west nineteen hundred feet north of his premises, running into the said city, and it is proposed by the cartway in question to connect the said Mueller's premises with this highway by opening a way nineteen hundred feet long and two rods wide over the premises of Henry Mueller, so as to give the public access to the premises of Herman Mueller, and to give him convenient access to the city of New Ulm, his market and business place, and to other places. On the other hand, it appears that it is possible for Herman Mueller to construct a road down the bluffs in question on his own land, and thus to connect with a track or road at the bottom of the bluffs and leading to the said city;

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but whether it is practicable to construct such road is a disputed question, and was submitted to the jury.

It further appears that the appellant owns an eighty-acre tract of land east of the one upon which his buildings are situated, running east and west, and that at the east end of this tract, and about three-fourths of a mile from the said Herman Mueller's buildings, there is a road running north and south, and connecting with the New Ulm road some distance north of the said tract; that the said Mueller can, by making a road three-fourths of a mile long over his own premises in an easterly direction, reach this road; and that thus he can reach the city of New Ulm and his market and business place by making a detour of a mile and a half.

It is the contention of the supervisors that, because the said Mueller has such access to public ways over his own premises, there is no necessity for another road, irrespective of the question of convenience, sufficiency, or practicability of such other outlets. Under these facts, the district court, holding that it was for the jury to determine whether or not a reasonable public necessity existed for the laying out of the cartway over the premises of the said Henry Mueller, refused to disturb their verdict ordering the laying out of the road; and we must do likewise, for we cannot say that the evidence is "indisputably conclusive against it."

Order affirmed.

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J. F. NELSON v. INTERNATIONAL HARVESTER COMPANY OF AMERICA.[1]

April 26, 1912.

Nos. 17,475—(53).

Malicious prosecution — verdict sustained by evidence.

In an action for the malicious prosecution of a civil action, it is *held* that the questions of want of probable cause, malice, and whether the civil action was commenced in good faith, acting upon the advice of counsel, after a full and fair statement of the facts, were properly submitted to the jury, and that the evidence sustains the verdict.

Action in the district court for Clay county to recover $1,000 for malicious prosecution. The answer admitted that on or about January 31, 1910, defendant commenced an action in justice court in the city of Moorhead, but denied that the action was instituted maliciously; admitted the affidavit of garnishment therein and that $97.81 was seized and held under garnishment, but denied that the same was done maliciously or to vex, harass and injure plaintiff; admitted that on the trial of May 9, 1910, in district court a verdict was returned in favor of the defendant in that action, and the seizure on May 15, 1910, by garnishment of $192.18, but denied that the action was taken maliciously, and alleged that defendant's action was taken upon advice of counsel after a full and fair statement of facts. The case was tried before Nye, J., and a jury which returned a verdict in favor of plaintiff for $1,000. From an order denying defendant's motion for judgment notwithstanding the verdict and denying its motion for a new trial, unless plaintiff would consent to a reduction of the verdict to $750, it appealed. Affirmed.

[1] Reported in 135 N. W. 808.

[Note] When malice may be inferred in action for malicious prosecution, see note in 9 L.R.A.(N.S.) 1087.

Advice of counsel as defense to action for malicious prosecution, see note in 18 L.R.A.(N.S.) 49.

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Ball, Watson, Young & Lawrence and *E. E. Sharp,* for appellant.

William Russell, William R. Tillotson and *F. H. Peterson,* for respondent.

BROWN, J.

Action for damages for the alleged malicious prosecution of a civil action. Plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

It appears from the record that on July 9, 1903, defendant conditionally sold and delivered to plaintiff, at an agency and place of business maintained by it at Beaver Lake, Canada, near which place plaintiff was then engaged in farming, a mowing machine and hay rake, the purchase price of which was $110. Plaintiff at the time paid $35 in cash, and for the balance executed and delivered to defendant his note or contract for the sum of $75, due and payable November 1, 1904. This note or contract described the property, and expressly provided that the title thereto should be and remain in defendant until the note was paid in full. In December, 1903, or January, 1904, plaintiff paid the agent of defendant who made the sale of the machine $20 upon the note, and at the same time delivered to him a quantity of hay, to be by the agent sold and the proceeds applied upon the note. In July, 1904, plaintiff gave up his farming operations in Canada, and returned the machinery to defendant's said agent, who accepted the same in full settlement and discharge of the note. Plaintiff then removed to this state, and subsequently entered the service of the Northern Pacific Railroad Company as a conductor on one of its trains running between Jamestown, North Dakota, and Dilworth, this state. Defendant, claiming that the note had not been paid, made diligent effort during the years 1907 and 1908 to locate plaintiff, and in 1909 learned of his then residence and occupation. The company demanded payment of an alleged balance due upon the note, and plaintiff promptly refused further payment, upon the ground that he had settled and paid the note in full to the agent of the company at its offices and place of business where the original purchase was made. He informed de-

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fendant's agents at Fargo, North Dakota, where the note had been sent for collection, the manner in which he claimed to have fully discharged the note, namely, by the payment of $20 in cash, the delivery of hay of the value of $24, and the return of the machinery to defendant's agent in Canada, under the agreement and understanding that the return of the machinery should be taken and accepted in full of any balance due.

It appears without dispute that defendant's agent who made the sale accepted the machinery, and subsequently resold the same, or a part thereof, reporting the fact to the company. The agent of the company at Fargo gave no force or effect to this matter, and informed plaintiff that the payment in hay or other commodity was not binding upon the company, and that unless he paid the balance claimed to be due suit would be brought against him to recover the amount, and the wages due him from the railroad company attached and tied up by garnishment proceedings. Plaintiff still insisted that the note had been paid, but finally, "to purchase peace" and prevent the garnishment of his wages, he agreed to pay the sum of $25, at the rate of $5 per month. The company agreed to accept this, but plaintiff later repudiated the offer and returned to his original position that the note had been paid.

Thereafter defendant brought suit against plaintiff before a justice of the peace of Clay county, this state, to recover upon the note, at the same time causing garnishment proceedings to be instituted, by which the wages due plaintiff from the railroad company were attached to the amount of $97.81. The justice rendered judgment for the company for the full amount demanded, something over $40, and plaintiff appealed to the district court, where, after trial before a jury, a verdict was rendered for plaintiff, finding that the note had been fully paid. The verdict was so returned on May 9, 1910. On May 19, 1910, at the suggestion of one of the agents of defendant at its Fargo office, a second garnishment was sued out in the district court against plaintiff, by which the further sum of $192.18 was attached and tied up. The purpose of this was, as expressed by one of defendant's witnesses, "to tie up sufficient funds to cover

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costs in case of an appeal to the Supreme Court." Thereafter, on June 13, 1910, defendant moved for a new trial of the action, which was denied on the 27th of the same month. On July 22, 1910, defendant appealed from that order to the Supreme Court, but voluntarily dismissed the same on August 8, 1910. The district court dismissed the second garnishment above mentioned on June 2, 1910, on plaintiff's motion, upon the ground that it was "unwarranted, vexatious, and unjust."

Subsequent to the dismissal of the appeal from the order denying a new trial, plaintiff brought this action, charging in his complaint that the action upon the note and the garnishment proceedings were commenced maliciously and without probable cause, and with intent to vex, harass, and annoy plaintiff and the railroad company, and to cause the latter to discharge plaintiff from its employ. Plaintiff had verdict for $1,000, which the trial court reduced to $750. Defendant appealed.

The assignments of error in this court present two questions, and counsel for defendant contend: (1) That the evidence wholly fails to show want of probable cause for the commencement of the action upon the note; and (2) that it conclusively appears from the evidence that the action was brought against plaintiff upon the advice of counsel, after a full and fair disclosure of all material facts. We are unable, on the record before us, to sustain either contention.

1. Probable cause for the commencement of a civil action consists in "such facts and circumstances as will warrant a cautious, reasonable, and prudent man in the honest belief that his action and the means taken in prosecution of it are just, legal, and proper." 26 Cyc. 43; Burton v. St. Paul, Minneapolis & Manitoba Ry. Co. 33 Minn. 189, 22 N. W. 300. The burden of proof is on the plaintiff, and the fact of want of probable cause must be established by him by a fair preponderance of evidence.

In the case at bar defendant recovered a judgment in the justice court, and, had the action ended in that court, want of probable cause would have been conclusively negatived, for there is no claim that the judgment was procured by fraud. There was an appeal,

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however, to the district court, where plaintiff had a verdict on the merits of the case, and this, with the subsequent voluntary abandonment of that action by the dismissal of the appeal from the order denying a new trial, sufficiently rebutted any inference or presumption arising from the justice court judgment. Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 638, 114 Am. St. 711.

It has been held that the final determination of a civil action in defendant's favor constitutes prima facie want of probable cause, shifting the burden of proof on that issue upon defendant. Wetmore v. Mellinger, 64 Iowa, 741, 14 N. W. 722, 18 N. W. 870. But plaintiff did not rest upon proof of the final determination of the action in his favor, but went further, and offered evidence which, if true, conclusively established the fact that defendant had no cause of action against him. The truth of the matters disclosed by plaintiff was within the knowledge of defendant, or with reasonable diligence could have been ascertained, and it was incumbent upon it either to deny or explain the same. There was no attempt to do this. And we hold that the question was properly submitted to the jury.

It appears, in addition to the final determination of the justice court action in plaintiff's favor, that the basis of defendant's cause of action was the promissory note already referred to. The note contained a clause to the effect that the title to the property should remain in defendant until the indebtedness was paid in full. The note was for $75. Plaintiff's evidence tends to show that he paid upon the note $20 in cash, and delivered to defendant's agent hay of the value of $24, to be applied as payment; that thereafter he returned the machinery to defendant's agent, of whom the original purchase was made, under the agreement and understanding that the balance due upon the note should be canceled and the debt discharged. It also appears that the agent accepted the return upon that agreement. He subsequently sold a part of the machinery, and reported the fact to the company, and the amount received was indorsed as a payment upon the note. When called upon to pay the alleged balance due by the Fargo office of defendant, the agents in

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charge thereof were informed of these facts, and if they doubted plaintiff the facts could readily have been learned.

There was no evidence offered in contradiction of plaintiff's claim upon this subject, nor any evidence negativing the authority of the agent to accept a return of the machinery on the terms stated. Though the agency was located in a foreign country, northwest Canada, it was presumably within the call of defendant at all times. Yet the agent was not called upon either to deny or explain the transaction. Nor did defendant present any claim under the further provision of the sale contract granting it, in certain contingencies, the right to retake the property and sell and dispose of the same at public or private sale, without prejudice to its right to demand payment of any balance due on the note. There was no claim that defendant or its agent proceeded under that part of the contract, and it remains undisputed that the property was returned and accepted in discharge of the contract.

From these facts we have no difficulty in reaching the conclusion that the jury was fully justified in finding want of probable cause for the action against plaintiff. It is a thoroughly settled law in this and other states, where personal property is sold upon the condition and reservation that title thereto shall not pass from the seller until the purchase price is paid in full, that the seller, upon the default of the purchaser to make payment as required by the contract, has the election of one of three remedies: (1) He may reclaim the property; (2) he may treat the sale as absolute and sue to recover the debt; or (3) bring an action to foreclose his lien; but the assertion of either right is the abandonment of the other. Keystone Mnfg. Co. v. Cassellius, 74 Minn. 115, 76 N. W. 1028; 35 Cyc. 696, and authorities there cited. When the property is retaken by the seller the contract is at an end, and no further rights thereunder exist against the purchaser. It operates as a rescission of the executory agreement to sell. In this respect it can make no difference, from the standpoint of law, whether the seller reclaim the property as a matter of right and in virtue of the authority conferred by the contract, or by the voluntary return by the purchaser and acceptance

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by the vendor under agreement to discharge the debt. In either case the contract relations between the parties, as respects the particular contract, came to an end.

In this conclusion we give no force or effect to the alleged delivery of hay as a payment. Nor does the fact that there existed for some time prior to the commencement of the action complained of a controversy between plaintiff and defendant's Fargo agents, respecting the liability of plaintiff, and that plaintiff offered to compromise the same by the payment of $25, in any proper view change the situation. Plaintiff at all times denied his further liability, and his offer of payment was, as he expressed it, to avoid the garnishment of his wages which defendant had threatened. This offer of compromise, for the purpose stated, was not sufficient basis for an honest belief that defendant had a cause of action against plaintiff.

2. Want of probable cause having been shown, the presumption of malice arose, and it was not necessary that actual malice be shown. We cannot escape the conclusion, however, that the jury was justified in finding actual malice. The repeated garnishments issued against plaintiff, particularly the second, after a verdict had been returned against defendant in its action upon the note, were clearly unwarranted and unjust, and bear earmarks other than a good-faith effort to collect a supposedly honest debt. Tykeson v. Bowman, 60 Minn. 108, 61 N. W. 909.

3. We are also of opinion, and so hold, that the question whether defendant was protected from liability by the advice of counsel was properly submitted to the jury. There is no conflict in the authorities upon the general proposition that advice of counsel is a complete defense to an action for the malicious prosecution of either a civil action or a criminal charge, when it is made to appear that the prosecutor fully and fairly stated all the facts within his knowledge, or which by reasonable diligence he might have learned, to a reputable attorney, and that in bringing the action or instituting the criminal prosecution he honestly and in good faith relied and acted upon the advice given him. Nor is it material whether the advice be sound or unsound in point of law. The protection springs from the ad-

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vice, founded upon a full statement of facts, and good-faith reliance thereon. Shea v. Cloquet Lumber Co. 92 Minn. 348, 100 N. W. 111, 1 Am. & Eng. Ann. Cas. 930, and authorities there cited in the note. Where the evidence is undisputed, and it clearly appears that all the facts were fully submitted to the attorney, as well as the good-faith reliance upon his advice, the question resolves itself into one of law for the court. Mundal v. Minneapolis & St. Louis Ry. Co. 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Moore v. Northern Pacific Ry. Co. 37 Minn. 147, 33 N. W. 334; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203.

But, where the facts are in dispute, the question goes to the jury. In the case at bar the court submitted the question to the jury. In this we conclude there was no error. It does not in our opinion conclusively appear from the record that all the facts within the knowledge of defendant, or which by reasonable diligence it could have learned, were fully or fairly stated to the attorneys whose opinion defendant claims to have relied upon. It is extremely doubtful whether the attention of the attorneys was called to the undisputed fact that the company had accepted a return of the machinery under the agreement to discharge the debt, or that a part of the machinery had been sold and the proceeds appropriated by the company.

While it does appear that Exhibit 1, containing numerous letters, memorandums, and documents relating to this note, was handed to the attorneys for examination, all the facts stated were not there disclosed, and, besides, it does not appear that anything more than a very cursory examination thereof was made, or that the real situation was impressed upon the attorneys by an oral communication on the part of defendant's officers and agents having knowledge of the essential facts. The agent who accepted a return of the machinery was not called upon for his version of the transaction, and the record leaves the impression that the attorneys were governed very largely, in giving their opinion that defendant had a cause of action against plaintiff, by the fact that a payment upon the note was claimed to have been made in hay. And if they had in mind the fact that the machinery had been returned to and accepted by

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defendant, they were unaware of the further fact that the acceptance was upon the agreement to discharge the debt. We say, therefore, that it is doubtful whether the facts were fully and fairly stated to counsel, and the question was one of fact.

It is also uncertain whether reliance upon the advice of counsel was in good faith. Defendant knew of the return of the machinery, that a part thereof had at the time been resold, and it was bound to know as a matter of law that under the agreement for the return its contract with plaintiff was brought to an end, and that it had no further claim against him for the purchase price of the property. Yet with all this knowledge the action was commenced, and supplemented with vexatious garnishment proceedings.

Order affirmed.

OLE LANDRO v. GREAT NORTHERN RAILWAY COMPANY.[1]

April 26, 1912.

Nos. 17,480—(45).

Damages excessive.

A verdict for $12,500 in this case *held* excessive, and reduced to $8,000, consent to which reduction is made a condition for denying a new trial.

Evidence.

The exhibition of plaintiff's person to the jury, and the experiments conducted therewith, referred to in the opinion, as well as the cross-examination of defendant's expert witnesses in the manner referred to, criticised, but *held*, under the circumstances of this case, not to be prejudicial error.

Remarks of counsel not prejudicial.

Certain remarks of counsel in his address to the jury *held* not to constitute prejudicial error.

[1] Reported in 135 N. W. 991.

[Note] Power to compel plaintiff in a suit to submit to a physical examination, see note in 23 L.R.A.(N.S.) 463.

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After the former appeal reported in 114 Minn. 163, the action was tried before Grindeland, J., and a jury which returned a verdict in favor of plaintiff for $12,500. From an order denying defendant's motion for a new trial, defendant appealed. Affirmed.

J. D. Sullivan, for appellant.

G. Halvorson, Julius J. Olson and *Charles Loring,* for respondent.

BUNN, J.

The first trial of this case resulted in a verdict of $6,500, which this court held so excessive that it could not be accounted for, except on the ground of passion and prejudice. Landro v. Great Northern Ry. Co. 114 Minn. 162, 165, 130 N. W. 553. The second trial resulted in a verdict of $12,500, and this appeal is from an order denying a new trial.

Defendant admits liability in some amount, but insists that the verdict is grossly excessive, and that there were prejudicial errors on the trial. The facts as stated in the decision on the former appeal need not be restated. The second trial was in June, 1911; the accident, in February, 1909. The lapse of time between the accident and the trial is alone sufficient to make the case different from the case presented on the first trial, had before it was possible to judge whether plaintiff's injuries were permanent, or whether they could be cured or helped by treatment.

As the record now stands, a clean question of fact is presented, both as to the nature and as to the probable duration of plaintiff's injuries. Medical experts of high repute gave their opinion that plaintiff was suffering from a partial dislocation of the sacro-iliac joint, and that it was permanent. Medical witnesses of equally high standing were positive that there was no dislocation. But clearly the evidence is such that the verdict of the jury is final on this question. We must accept it as established, therefore, that there is this dislocation, that it has been and will be to some extent painful, and that it probably cannot be cured. But there is no visible deformity. Plaintiff weighs practically as much as before the accident, his appetite is perfect, and he sleeps well. He cannot walk much, and his

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capacity for certain lines of employment that require physical exertion has been seriously impaired. In short, accepting, as we must, the testimony of plaintiff and his witnesses, the injury is a serious one, and entitles plaintiff to substantial compensation.

But we cannot avoid the conclusion that $12,500 is considerably more than fair compensation. Giving full weight to the verdict, and to the decision of the trial court refusing to disturb it, we still feel that the amount is excessive, and that we ought to make an effort to correct the injustice that has been done, and at the same time, if possible, end the case. Another trial will be an additional expense to both parties, and the result might be even less satisfactory than the verdict here. We think that $8,000 will be ample compensation to plaintiff, and that it is the limit that should be permitted on the evidence before us.

It is this desire to end a vexatious litigation, and the fact that there must ultimately be a recovery in some amount, that leads us to the conclusion that the errors alleged were not so plainly vital and prejudicial as to require a new trial; but we must not be understood as giving our approval to the exhibition of plaintiff's person before the jury, and the experiment made to show the presence of symptoms claimed by plaintiff's experts to indicate dislocation of the joint, including groans by plaintiff.

It is within the discretion of the trial court to permit a plaintiff in a personal injury case to exhibit his injuries to the jury, in order to show their extent or to enable a surgeon to demonstrate their nature and character. Hatfield v. St. Paul & Duluth Ry. Co. 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14; Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 115 N. W. 949. It is also discretionary to permit tests and experiments in the presence of the jury in a proper case and under proper safeguards. But where there are no wounds, no injuries that can be seen by the jury, it is improper to permit the exhibition of plaintiff's person for the purpose of conducting experiments to prove that he will cry out with pain, or that his muscles will grow rigid when his legs are manipulated in a certain manner. It was a hotly disputed question whether plaintiff had

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any "objective" symptoms; but it is quite clear that he had none that could be seen by the jury. Trial courts should always exercise this discretion with caution, and when it appears that the probable effect of the exhibition will be, not to instruct the jury as to the nature and extent of the injuries, but to excite their sympathies or inflame their passions, it should not be permitted.

The trial court permitted the cross-examination of defendant's expert witnesses as to opinions expressed by a standard authority contrary to those given by the witnesses. Of course, medical books, however celebrated their authors, are not admissible in evidence, because the author is not under oath, and not subject to cross-examination. But, for the purpose of testing the qualifications, as well as the credibility, of an expert, it is generally held, as in Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L.R.A. 141, that when the witness has testified that the authorities support his view, he may be asked on cross-examination whether a medical work, admitted by him to be a standard authority, does not express a contrary view. And it is no objection to such cross-examination that incidentally the opinions of the author are thus brought before the jury. Theoretically the author's opinions are not substantive evidence but are merely impeaching evidence.

It is, however, open to serious doubt whether the cross-examination in the case at bar should have been permitted, at least to the extent it was. It was admitted by all the experts that it was a disputed question among the authorities whether the sacro-iliac joint in a man was fixed or movable. The result of reading to the witnesses extracts from the work of an admittedly great surgeon and authority was to get this evidence before the jury, not merely to impeach the testimony of defendant's witnesses, and it was clearly impossible for the jury to distinguish between substantive and impeaching testimony. The purpose and probable effect of such a cross-examination should be carefully considered by the trial court. In view of our disposition of the case, we hold that the error, if any, was not prejudicial.

The reference of plaintiff's counsel, in his address to the jury, to

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the power of this court to reverse the action of the jury, or reduce the verdict, and to its want of power to "make us take what they want to give us," was not legitimate argument; but, in view of the instruction given to the jury to disregard these remarks, we think there was no prejudicial error in this regard.

It is ordered that the order appealed from be reversed, and a new trial granted, unless plaintiff shall, within ten days after the remittitur is returned to the court below, file a written consent to a reduction of the verdict to $8,000, in which event the order appealed from will be, and it is, affirmed.

EUGENE GERMANN v. GREAT NORTHERN RAILWAY COMPANY.[1]

April 26, 1912.

Nos. 17,483—(51).

Exemplary damages.

Held, in this a personal injury action, that the evidence justified the submission of the question of exemplary damages to the jury, and that the award of damages is not so large as to justify a reversal of an order denying a new trial.

After the former appeal, reported in 114 Minn. 247, 130 N. W. 1021, the action was tried before Watts, J., and a jury which rendered a verdict in favor of plaintiff for $1,100. From an order denying its motion for a new trial, defendant appealed. Affirmed.

J. D. Sullivan, for appellant.

W. E. Rowe and *Charles Loring,* for respondent.

START, C. J.

The plaintiff was a passenger on a railway train of the defendant,

[1] Reported in 135 N. W. 750.

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and became involved in a difficulty with the defendant's employee on the train, a colored cook, who, as the plaintiff claims, assaulted and beat him. This action was brought for the recovery of damages from the defendant on account of injuries sustained by the plaintiff by the assault. The result of the first trial was a verdict in favor of the plaintiff for $2,000. The defendant's motion for a new trial was denied, upon condition that plaintiff consent to a reduction of his verdict to $1,000. He complied with the condition, and the defendant appealed from the order. This court reversed the order, and granted a new trial on the ground that the damages were so excessive as to justify the conclusion that they were awarded under the influence of passion and prejudice. Germann v. Great Northern Ry. Co. 114 Minn. 247, 130 N. W. 1021.

On the second trial of the action there was a verdict for the plaintiff for $1,100, as stated in the return. The defendant appealed from an order denying its motion for a new trial, and here urges that the order must be reversed, and a new trial granted, on the ground that the verdict is excessive, and given under the influence of passion and prejudice, and, further, that the trial court erred in submitting to the jury the question of exemplary damages. It is not claimed that the instruction as to exemplary damages was not, as an abstract proposition, legally correct; but it is insisted that the evidence did not justify the submission of the question to the jury.

It appears from the evidence that the plaintiff, with two friends, took seats in a day coach of the train, and that the plaintiff repeatedly asked the cook, evidently believing that he was the porter, to open one of the seats in the car, to which requests the cook gave no heed by word or act. A fight followed, but as to which party opened it the evidence is conflicting. If it was the cook, the admitted fact that the plaintiff called him a "coon" mitigates, but does not justify, his act; and, if the fight had not been renewed, the submission to the jury of the question of exemplary damages would have been error. The evidence, however, taking the most favorable view of it for the plaintiff, tends to show that the plaintiff's face was cut and was

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bleeding as a result of the altercation in the day coach; that he went into the toilet room, got a towel, and washed the blood from his face, and then, taking the towel with him, he started for the chair car, where his friends had gone; that after he got into the chair car, some minutes after the first fight ended, and was peaceably proceeding up the aisle, the cook came up behind him, struck him over the head with a bunch of keys, knocking him down, then pounded him over his head and on his face, got hold of his thumb and chewed it, cut his head, eyebrow, and upper lip, and, further, that after the parties were separated, and when the train arrived at Crookston, the conductor took the plaintiff from the train and turned him over to the defendant's physician for medical treatment, who did treat him for four days.

The doctor in his testimony described the plaintiff's injuries as follows: "He was very much covered up with blood, and the right side of his head here was scratched up, just like scratches, and I remember the eyelid was cut so it hung down; a cut over the lid, so the lid hung down. The upper lip was cut through, and there was a straight cut across the back of the head here (indicating). * * * The right thumb was bitten almost to the bone on both sides, right near the joint."

The evidence to which we have referred was contradicted in material particulars by evidence on behalf of the defendant. The evidence on behalf of the plaintiff, if true, and of this the jury were the judges, tends to show that the assault on the plaintiff in the chair car was malicious and vicious, and justified the trial court in submitting to the jury the question of exemplary damages. While we regard the award of damages, in view of all the facts disclosed by the evidence, as very liberal, yet it is not so large as to justify us in setting aside a second verdict and sending the case down for a third trial.

Order affirmed.

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FINNISH PEOPLE'S HOME COMPANY v. LONGYEAR-MESABA LAND & IRON COMPANY and Others.[1]

April 26, 1912.

Nos. 17,517—(60).

Vacating fraudulent satisfaction of judgment.

The trial court, under the facts in this case, had power to set aside on motion a false or fraudulent satisfaction of a judgment rendered by it.

Exclusion of evidence.

There were no errors in excluding evidence offered by plaintiff on the hearing.

Appeal by plaintiff from an order of the district court for St. Louis county, Cant, J., granting a motion to strike from the files and records a pretended satisfaction of judgment and reinstating the judgment. Affirmed.

John A. Keyes and *J. W. Reynolds,* for appellant.

Wm. E. Culkin and *John E. Samuelson,* for respondent.

BUNN, J.

This is an appeal by plaintiff from an order striking from the files and records a pretended satisfaction of a judgment entered in the action in favor of defendant Laansi Toivo, and against plaintiff, and reinstating the judgment. The material facts are as follows:

In April, 1906, a number of Finnish people residing in and near Aurora, St. Louis county, attempted to form a corporation pursuant to chapter 58, R. L. 1905, under the corporate name of Laansi Toivo, for the purpose of promoting moral, educational, and reformatory purposes and temperance. There was no corporation de jure, because of failure to file articles in the office of the secretary of state; but there was clearly a corporation de facto, the society holding regular meetings until about January 1, 1909. September 12, 1906,

[1] Reported in 135 N. W. 990.

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defendant Longyear-Mesaba Land & Iron Company conveyed to defendant Laansi Toivo a lot in Aurora, and the society erected a building thereon for its purposes. Prior to December, 1908, factional differences arose among the members of the society. At a meeting held December 27, 1908, one of the factions secured control. The officers then elected pretended to authorize the president and secretary to convey the lot to plaintiff, a corporation organized prior thereto. The conveyance was made, plaintiff took possession of the property, and afterwards brought this action to determine adverse claims thereto.

Defendant Laansi Toivo and defendant Laansi Toivo Temperance Society answered, and the trial resulted in a decision that the faction of the society that had been excluded at the meeting of December 27, 1909, was the genuine Laansi Toivo, that the pretended conveyance to plaintiff was void, and that Laansi Toivo was the owner of the property free and clear of any claims of plaintiff, or of any other of defendants, and that it should have judgment for the possession thereof and for costs. On May 2, 1911, judgment was entered pursuant to this decision; the costs amounting to $301.02.

On May 25, 1911, there was filed a satisfaction of the judgment, which purported to be executed by Laansi Toivo, through its president and secretary, by authority from its board of trustees. This recited that the judgment for costs was paid and satisfied in full, authorized the clerk of court to satisfy and discharge the same of record, and stated that "the premises may remain in the possession of the said plaintiff." The motion to set aside this satisfaction was made on affidavits tending to show that it was executed by the faction that the decision held did not constitute Laansi Toivo. Opposing affidavits were presented, and the motion was heard on these affidavits, and also on oral evidence received over plaintiff's objection. The evidence showed clearly that the only issue presented was the same issue that had been tried and decided in the action; that is, which was the true Laansi Toivo, the faction which had attempted to convey the property to plaintiff and which had authorized the

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satisfaction, or the faction that had been expelled from the meeting of December 27, 1908.

The contentions of plaintiff on this appeal, though vigorously presented, are without merit. It is argued that the court had no jurisdiction to hear and determine the questions involved upon motion, but only in an action. The authorities cited clearly have no application to a case like this. There had been a full trial, and the motion was made, in the case tried, to set aside a pretended satisfaction of the judgment entered. Clearly there was inherent power in the court to enforce its judgment, and to set aside on motion a false or fraudulent satisfaction, which on its face rendered nugatory the decree which the court had rendered. No rights had intervened after the judgment, and no issues arose on the motion, other than those that had been tried and determined in the action. It was within the discretion of the court to receive oral testimony on the hearing.

Plaintiff's main contention is that the trial court erred in rejecting evidence offered to show who constituted Laansi Toivo. As before stated, it appears conclusively from the decision that this question was the very question tried and decided in the action. Notwithstanding plaintiff's repeated assertions that the court did not decide this question, it is very clear to us that it was not only decided but was the vital and only question in the case. The court was certainly not bound to retry and redetermine this question on this motion. The only question for decision on the hearing of the motion was as to which faction executed the satisfaction. As it was clear that it was not the faction that had been held in the action to be the real Laansi Toivo, the order setting aside the satisfaction was clearly right.

Order **affirmed.**

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STATE ex rel. CITY OF ST. PAUL v. ST. PAUL CITY RAILWAY COMPANY.[1]

April 26, 1912.

Nos. 17,529—(16).

Street railway — authority of city council — ordinance valid.

Appeal from a judgment awarding a peremptory writ of mandamus to compel the St. Paul City Railway Company to construct and operate a street railway upon Maryland street, from Rice street to Como boulevard, pursuant to an ordinance of the city. *Held*, construing section 18 of Ordinance No. 1227, that the city has, by its common council, the vested right to require the railway company to construct new lines of street railway; that such right was not suspended or modified by sections 32 and 33 of chapter 4 of the home rule charter; that the ordinance requiring the construction of the new line is valid; that compliance therewith may be enforced by mandamus; that the question whether public interest or necessity requires the construction of any particular new line is one resting in the discretion of the common council, and its action cannot be interfered with by the courts, unless it is clearly an arbitrary one; and, further, that the finding of the trial court that a public necessity exists for the new line, and that it is not a cross-town line, is sustained by the evidence.

Upon relation of the city of St. Paul for a writ of mandamus to compel defendant to construct and maintain a certain street railway line, pursuant to a certain city ordinance requiring its construction, the district court for Ramsey county granted its alternative writ. In its answer the respondent set up that the line ordered was a cross-town line; that there was no cross-town travel in that part of the city; and that such proposed line was in violation of the provisions of section 3 of Ordinance No. 2,786. The matter was tried before Olin B. Lewis, J., who made findings, and as conclusion of law ordered that respondent railway company forthwith construct, and maintain, and operate a line of street railway upon Maryland street from Rice street to Como boulevard in St.

[1] Reported in 135 N. W. 976.

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Paul, and properly connect the tracks thereof with its tracks upon Rice street, and to that end that a permanent writ of mandamus issue. From the judgment entered pursuant to the findings, the railway company appealed. Affirmed.

J. C. Michael and *N. M. Thygeson*, for appellant.

O. H. O'Neill, for respondent.

START, C. J.

On February 21, 1910, the common council of the city of St. Paul duly passed an ordinance requiring the St. Paul City Railway Company, hereinafter referred to as the Railway Company, to lay, construct, and operate a double line of street railway upon Maryland street, from Rice street to Como boulevard, and connect the tracks thereof with its railway tracks on Rice street. The railway company refused to comply with the ordinance. Thereupon this action was commenced in the district court of the county of Ramsey to compel the construction and operation of such street railway as required by the ordinance. The cause was tried by the court without a jury, and findings of fact made to the effect that the allegations of the petition are true, and, further, that a public necessity exists for the construction and operation of the line of street railway upon Maryland street, and that the same is not a cross-town line. As a conclusion of law, judgment was ordered, awarding a peremptory writ of mandamus, requiring the railway company to construct and operate the line as directed by the ordinance. Judgment was so entered, from which the railway company appealed.

The appellant's assignments of error raise the general questions whether the findings of fact are sustained by the evidence, and whether the ordinance is valid, and, if so, whether a compliance therewith may be enforced by mandamus. The questions as to the validity of the ordinance and its enforcement are the important ones presented by the record. Their solution involves a consideration of the provisions of several city ordinances relating to the appellant.

The railway company as originally organized acquired its rights in the streets of St. Paul by an ordinance of the common council,

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No. 57, approved in January, 1872, which gave the railway company the right to construct and operate its street car lines upon any or all of the streets and avenues of St. Paul, except on a designated portion of Third street. This ordinance provided that only animal power should be used in the operation of the lines. Section 7 of this ordinance contained this proviso: "Provided, that if required by a resolution of the common council adopted by a vote of two-thirds of its members, to build, equip and operate an additional mile of said railway on any street or streets designated by the city council, every six months thereafter, the company accepting this franchise shall so build, equip and operate said mile or miles of railway, or forfeit to said city all rights or privileges to construct and operate any line of railway or track in any street or streets, or part of street or streets upon which said company has not constructed any railway tracks." This was the only provision relating to any right reserved to the council to order new lines to be constructed.

Additional and valuable rights were granted to the railway company by an ordinance, No. 1227, approved September 20, 1889, in consideration of which, and by the same ordinance, material rights and powers with reference to the control of the railway company by the common council were acquired by reservations and stipulations therein and the acceptance of the ordinance by the railway company. In and by this ordinance the railway company was granted the right to construct its lines and to operate them by electricity on designated streets of the city, which right, by a subsequent ordinance, No. 1502, was extended to all other streets upon which the railway company had the right to operate its lines. In consideration of the grant to it by ordinance No. 1227, the railway company surrendered its rights as to certain other streets, but Maryland street was not one of them. The following provisions of the ordinance are here material:

"Sec. 18. The common council reserves and shall possess the right at any time, and from time to time, after January 1, 1892, to order the construction and completion by said Saint Paul City Railway Company of any new lines of railway, or the extension

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of any present or future lines of railway upon any and all streets in the city of Saint Paul upon which sewers shall have been constructed, and all lines or extensions so ordered shall be constructed and in operation within one year after such orders are made: Provided, that when such new lines or extensions are constructed all the provisions of this ordinance shall apply thereto.

"Sec. 19. If said Saint Paul City Railway Company shall fail or neglect to complete, equip and operate all of said lines of railway designated in section one (1) of this ordinance within the time and in the manner herein specified, or shall fail to comply with the provisions of this ordinance, then all rights and privileges hereby granted shall be forfeited to the said city of Saint Paul."

"Sec. 23. The said Saint Paul City Railway Company, its successors and assigns, shall be entitled to enjoy the rights and privileges hereby granted for the term of fifty (50) years after the passage and publication of this ordinance.

"Sec. 24. Nothing in this ordinance contained shall have the effect of taking away or abridging any franchises, rights, powers and privileges granted to said company by any other ordinance or other authority, whether as respects the right to construct or maintain any railway or operate the same, or the power to be used in operating the same, or otherwise as may be prescribed by such other ordinance or authority, except as to the streets hereinbefore mentioned in section 16 of this ordinance."

The ordinance requiring the construction of the new line is based upon section 18 of Ordinance No. 1227. It is the contention of the railway company that the ordinance is invalid, and, further, that, if it is held to be valid, compliance therewith by the railway company cannot be enforced by mandamus; the sole effect of a failure to comply with the ordinance being a forfeiture of its rights in the street. It is urged in this connection that the ordinance was not authorized by section 18 of Ordinance No. 1227, because the right of street railways in the streets of a municipality is a franchise, that the reservation and stipulation, in section 18, that the common coun-

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cil shall possess the right at any time after January 1, 1892, to order the construction of new lines, constitute in no sense a grant of franchise to build and operate such new lines, and, further, that the section "is only a reservation of the right to enact further legislation at some future time, in the nature of an additional grant, but at the time of the enactment of Ordinance 1227, indefinite and uncertain, both as to the exercise of the reserved power and the streets to which it might apply."

It may be conceded that a right given to construct and operate street railways in the public streets is a franchise, and that section 18 is not in and of itself a grant of a franchise; but the conclusion claimed does not follow the concession, for the railway company had the right, by virtue of Ordinance No. 57 and the provisions of Ordinance No. 1227, to construct and operate its railway lines in all of the streets of the city, except as stated in Ordinance No. 1227. The street here in question is not within the exception. There was then no occasion for granting a franchise for any proposed new lines not within the exception. What, then, was the purpose of section 18?

It is obvious on the face of this section that its purpose was to secure to the municipality rights which it did not possess under the original ordinance, by virtue of which no absolute obligation rested upon the Railway Company to construct any new lines, on streets which it had the right so to do, on the demand of the common council. It is to be noted that section 7 of Ordinance No. 57 was limited to the building of an additional mile every six months, and, further, that the obligation imposed on the railway company was not absolute in its terms, but in the alternative. It was only required to comply with the requirement of the council to build the new line "or forfeit to said city all rights or privileges to construct and operate any line of railway or track in any street * * * upon which" the company had not built any railway track. While such an alternative obligation may have been sufficient for the protection of the interests of the city under the conditions existing at the time the original ordinance was enacted, and in view of the fact that only animal power

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could be used, yet it is quite apparent that is was not so under the conditions existing in 1889, when electricity was to be substituted for animal power. The railway company at this time was asking for additional and valuable rights, which the city by its common council could deny or grant absolutely or on condition that the railway company surrendered rights on its part which were then deemed to be disadvantageous to the city. Thereupon the parties by section 18 made a new compact as to the building of new lines, whereby the railway company absolutely obligated itself to build new lines as therein required. The railway company had, after accepting the ordinance, no longer the option to build the required lines or forfeit its franchise.

It is, however, contended that section 24 of the new ordinance, which we have quoted, preserves to the railway company this option to build or forfeit. This section cannot be construed as applying to any subject which was specifically dealt with and fully covered by the parties by their express stipulation in the ordinance. Clearly section 24 refers to the rights and privileges theretofore granted which were not dealt with in the new ordinance. For example, the right to construct and operate street railways with animal power on any streets it might select other than the streets excepted in Ordinance No. 1227. Any other construction would emasculate the express concessions and stipulations on the part of the railway company contained in the new ordinance. We accordingly hold that section 18 of Ordinance No. 1227, upon its acceptance by the railway company, became a valid contract between it and the city of St. Paul, whereby the city acquired the vested right to require the construction and operation of new lines as therein provided, and that the legal obligation to comply with the requirement was assumed by the railway company.

The next contention of the railway company is that, if the right of the city by its common council to require the building of new lines under section 18 ever existed, it has been suspended or repealed by the Home Rule Charter of the city of St. Paul (sections 32 and 33, chapter 4). These sections provide, in effect, that no

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extension or modification of any franchise or privilege heretofore granted, or any franchise hereafter granted, shall be valid, unless the grantee thereof shall agree in writing that the same shall be held subject to the conditions and limitations of the city charter, including the payment of a license fee of five per cent of the gross earnings. The object of these provisions is obvious. They were intended to prevent in the future the enlarging of existing franchises and privileges and the granting of new ones, except upon conditions which will secure the city some just compensation for the franchises and privileges granted. These sections of the charter have, however, no application to the ordinance directing the construction of the new line, for clearly it is not an extension of any existing franchise or privilege, or the grant of a new one; for, as we have stated, the railway company had the right to construct the new line, if it so elected, without first securing from the common council the right to so do. The ordinance was only the exercise of a right secured to the city by section 18 of Ordinance No. 1227. It follows that the ordinance requiring the new line to be built is valid.

The next contention to be considered is that, even if the ordinance is valid, mandamus will not lie to enforce it because the only remedy for the refusal of the Railway Company to construct any line required is by a forfeiture pro tanto of its franchise. The case of State v. Minnesota Southern R. Co. 18 Minn. 21 (40), is relied on in support of the contention.

That case was one in which the state sought to compel a railroad company, by mandamus, to construct its line to the village of La Crescent, and it was held that mandamus would not lie, because no complete and perfect legal obligation had ever been imposed upon the company to build the road. Such is not the case at bar, for, by the stipulations of section 18 of Ordinance No. 1227, a clear legal obligation was imposed upon the railway company to construct new lines as required therein, therefore mandamus will lie to enforce the obligation. State v. Minnesota Transfer Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

The Railway Company also urges that the finding of the trial

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court that public necessity requires the construction of the line in question, and that it is not a cross-town line, is not sustained by the evidence. It is clear from the record that the proposed line is not a cross-town line, even if it be conceded that such fact is here material. Whether public interest and necessity require the construction of a new line of railway upon any particular street upon which sewers have been constructed is a question resting in the discretion of the common council by virtue of section 18 of the Ordinance No. 1227. The court cannot interfere with the action of the council in ordering new lines unless such action is clearly arbitrary. The evidence in this case is sufficient to sustain the finding complained of.

The last assignment of error is this: "The court erred in making its findings of fact, conclusions of law, order for judgment, and decree herein, and in making each thereof, for the reason that the same are, and each of them is, contrary to and in violation of section 1 of article 14 of the amendments to the Constitution of the United States, and of section 10 of article 1 of the Constitution of the United States." There is no merit in this assignment, if our construction of section 1 of Ordinance No. 1227 is correct, and we hold that it is.

Judgment affirmed.

STATE ex rel. A. FINLAYSON v. JAMES GORMAN.[1]

April 26, 1912.

Nos. 17,567—(18).

Municipal corporation — employment of attorney.

The Water, Light, Power and Building Commission of the city of East Grand Forks, being a governmental department of the city, the city attorney is its legal adviser and it has no express or implied power to employ its own attorney, thereby creating a liability against the city.

[1] Reported in 136 N. W. 402.

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Same — liability of city.

Conceding without deciding that an emergency may give power where none otherwise exists, it is held that when the commission employed the attorney for whose services the city is sought to be made liable, no emergency existed, the commission had performed its duty, and was under no legal obligation to assist a private person to enforce a claim audited and ordered paid by it against the city.

Upon information of A. Finlayson, an alternative writ of mandamus was issued by the district court for Polk county to compel James Gorman, as city clerk of the city of East Grand Forks, and as secretary of the Water, Light, Power and Building Commission, to draw his warrant upon the treasurer of the city of East Grand Forks in favor of A. Finlayson, assignee of G. A. E. Finlayson, for the sum of $225, and deliver the same to be countersigned by the president of the commission. From an order, Watts, J., quashing the writ, relator appealed. Affirmed.

G. A. E. Finlayson, for appellant.

F. C. Massee, H. A. Bronson and *W. J. Rasmussen,* for respondent.

Holt, J.

The appeal is from a judgment entered upon an order quashing an alternative writ of mandamus, and involves the one question whether or not the Water, Light, Power and Building Commission of the city of East Grand Forks may create a liability against the city for compensation to an attorney employed by the commission.

It appears from the writ that the city, organized under Laws 1895, p. 16, c. 8, in 1909 availed itself of the provisions of Laws 1907, p. 588, c. 412, and duly created a water, light, power and building commission composed of three members. The respondent is the city clerk and under the law should act as secretary of the commission, and is the one whose duty it is to draw warrants upon the city treasurer for the claims allowed and ordered paid by the commission. It is further made to appear that the other city officials declined to

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recognize the authority of the commission, the city attorney refused to advise the commission when called upon, the city treasurer would not pay the claims incurred by the commission, and the respondent herein, as secretary, will not issue or sign the warrants ordered, so that the commission was practically ousted from office. In this situation the commission, in January, 1910, employed appellant's assignor as its attorney to give advice and institute such action in court as would establish the authority of the commission and enable it to perform its duties to the public. The attorney so employed rendered services between January 17, 1910, and March, 1910, in counselling and advising the commission in relation to the commencement of proceedings for relief and in the preparation, commencement and trial in the district court and this court of an action of mandamus to compel the city treasurer to pay a certain warrant issued to Robert Braithwaite by the commission, which action resulted in a peremptory writ compelling payment. This proceeding was brought in the name of the state on relation of the commission and the said claimant Braithwaite. It further appears that the attorney afterwards presented his claim for compensation for his services, and the commission November 1, 1910, duly allowed and ordered it paid in the sum of $229.12, said sum being the reasonable value of the services so rendered. The respondent's refusal to issue the warrant, though authorized and requested so to do by the commission, also appears, as well as the assignment of the claim by the attorney to the relator, the appellant.

In granting respondent's motion to quash the writ the trial court said: "I am of opinion that the Water, Light, Power and Building Commission has no power to make the city of East Grand Forks liable for fees of an attorney that it might hire without the authority of the city council of East Grand Forks to hire such attorney."

Sections 198 to and including section 201 of chapter 8, pages 82, 83, of Laws of 1895, under which the municipality was created, provide for the appointment of a city attorney and define his duties, stating that:

"He shall be the legal adviser of the city and shall perform all the

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services incident to the office, and shall appear in and conduct all civil suits, prosecutions and proceedings in which the city shall be directly or indirectly interested. . . . He shall advise the city council and all city officers in respect to their official duties. He shall personally or by an assistant attend all the meetings of the city council and such of its committees or boards as shall request his attendance, and no board, department nor officer of the city shall have or employ any other attorney in connection with their official duties."

Any assistant, permanent or temporary, must be appointed by the city attorney. (Sec. 201) The Water, Light, Power and Building Commission is merely a board or department of the city government. While it may, within its sphere, incur expense, enter contracts and allow and order the claims therefor paid independently of the city council, it has been given no power to sue or be sued, so that it stands in need of no attorney to carry on its litigation. Monfort v. Wheelock, 78 Minn. 169, 80 N. W. 955; American Electric Co. v. City of Waseca, 102 Minn. 329, 113 N. W. 899. Therefore, the commission being a department of the city, it must be conceded that, by the section above quoted, the duly appointed city attorney became its legal adviser, and the statutory inhibition against any board, department or officer of the city having or employing any other attorney in connection with their official duties applies to the commission.

And it follows that if this inhibition is in force as to the commission, no implied power for it to employ counsel may be read into Laws 1907 p. 588, c. 412. The intention of the legislature in the act of 1895 to guard against burdening the taxpayers of small cities with more than one legal department is so plain, and that object so worthy, that we have no inclination to adopt the view of appellant that the clause quoted in said section 200 of chapter 8 of Laws of 1895 was repealed by implication by the provision in said chapter 412 (Laws 1907) which reads: "They [the commission] shall have authority to buy all material, and employ all help necessary, or they may contract to extend, add to, change or modify said plants, build-

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ings and halls, or any part thereof; they shall also have authority to buy all fuel and supplies, and employ all help necessary to operate said plants."

It cannot be reasonably contended that this language was intended to confer the power to employ an attorney in view of the fact that for every city to which chapter 412 applies, the law already provided a legal adviser whose duty it is to render legal services for the city and every officer, board and department thereof. The duties of a city attorney in cities of less than ten thousand inhabitants cannot be exceedingly arduous. Frequently city officials disagree as to their several duties and clash, but because of this, can it for a moment be admitted that each has the power by implication to hire an attorney for consultation and litigation, and make the city responsible for the services so rendered? As bearing on this question and the reluctance of courts to imply power to hire attorney where none is given, may be cited Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 369; True v. Board of County Commrs. of Crow Wing County, 83 Minn. 293, 86 N. W. 102; and Jackson v. Board of Education of City of Minneapolis, 112 Minn. 167, 127 N. W. 569.

But counsel insists that the facts show that an emergency arose which threatened to deprive the city of the services of the commission. Granting that an emergency may create a power where none otherwise exists, we do not think the facts stated in the writ show an emergency. The litigation in which the attorney was employed was not directed against the commission as such, nor was any pecuniary interest of the public at stake in it. The cases cited and relied on by appellant, viz: Wiley v. City, 7 Wash. 576; Smedley v. Kirby, 120 Mich. 253; City v. Murphy, 86 Ky. 53; Barnert v. Mayor, 48 N. J. L. 395, are all cases where proceedings were taken against an official to compel him to perform some official act which he deemed violative of his duty to the public, and injuriously affecting interests of great consequence to the municipality, and where he was compelled to employ counsel or suffer judgment to go against the interests affected, because the regular city attorney refused to act or acted in opposition. Where such official succeeded in vindi-

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cating the stand taken, the court, in the above cases, holds that the municipality became liable for the services of the attorney employed by the official to carry on the litigation on the ground that the emergency made it imperative, when the duly appointed legal representative refused to act, or was acting against the interests of the municipality, that other legal assistance be secured.

But in the case at bar it is apparent from the writ that the attorney's services rendered by appellant's assignor were not in any proceeding either to compel or enjoin an official duty by the commission. Nor was its existence at stake. The statement in the writ that because certain city officers would not do their duty the result would wipe out the commission is a mere conclusion not meriting consideration. So that we have the fact that the attorney's services claimed were substantially all rendered in a mandamus proceeding instituted by the three commissioners and one Braithwaite, whose claim for services the commission had duly audited and ordered paid by warrant on the city treasurer. This warrant of Braithwaite the treasurer refused to pay, and the proceeding resulted in judgment directing payment. State v. McIllraith, 113 Minn. 237, 129 N. W. 377. The proceeding was the enforcement of a mere private right against the city, although incidentally it served to bring home notice to a contumacious city official that the commission possessed some authority. The commission had performed its full duty to the public and exhausted its powers with reference to the Braithwaite claim, when that was audited and ordered paid. No legal obligation rested on the commission to force the city treasurer to pay it. We concur in the opinion of the trial court that the claim sought to be enforced is not a legal claim against the city.

Affirmed.

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STATE ex rel. WILLIAM HOGAN v. P. J. SULLIVAN.[1]

April 26, 1912.

Nos. 17,613—(19).

Liquor license — wholesale trade.

Section 135, c. 8, Laws 1895, giving to city councils the power to license and regulate the sale of intoxicating liquors, construed, with reference to the whole legislation of the state dealing with the subject of licensing the sale of intoxicating liquors and the uniform practical construction thereof, and *held*, that it does not apply to exclusively wholesale dealers selling in quantities of five gallons or more.

Upon petition of William Hogan, the district court for Polk county issued its writ of habeas corpus directed to P. J. Sullivan, as chief of police of the city of East Grand Forks. The return certified that William Hogan was taken and kept in custody by virtue of a criminal warrant, issued by the municipal court of the city of East Grand Forks, directing the arrest of relator for selling eight gallons of beer to a certain firm without having obtained a license so to sell such malt liquor, and contrary to a certain quoted ordinance of said city. Relator demurred to the return. The matter was heard by Watts, J., who sustained the demurrer and discharged the prisoner. From the order sustaining the demurrer and discharging the prisoner, the chief of police appealed. Affirmed.

F. C. Massee and *H. A. Bronson,* for appellant.

G. A. E. Finlayson and *W. E. Rowe,* for respondent.

START, C. J.

Appeal from an order of the district court of the county of Polk discharging the relator, on habeas corpus, from the custody of the appellant as chief of police of the city of East Grand Forks, which is a city organized under Laws 1895, p. 16, c. 8.

[1] Reported in 135 N. W. 748.

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The city, by its common council, enacted an ordinance purporting to license and regulate the sale of intoxicating liquors, within the corporate limits, sold at wholesale; that is in quantities greater than five gallons. The relator was charged with a violation of the ordinance, arrested, and detained by the appellant by virtue of a warrant issued upon such charge. Thereupon the writ of habeas corpus issued.

The sole question here to be decided is: Was the city authorized to license the sale of intoxicating liquors at wholesale? If it was, the ordinance is valid, and the order discharging the relator must be reversed; but, if the city did not have such authority, the order must be affirmed.

The appellant claims that such authority was conferred by Laws 1895, p. 55, c. 8, § 135, which, so far as here material, is in these words: "The city council shall have power by ordinance, not inconsistent with the Constitution and laws of the state and of the United States, as follows: To license and regulate the sale of intoxicating liquors and the city council may designate within the territory in the city more particularly devoted to trade and manufacture than to residences certain definite limits to be known as the patrol limits, wherein intoxicating liquors may be sold."

Many of the contentions of the appellant may be conceded, without discussing them. It may be conceded that the charter provisions quoted, literally construed, without reference to other statutes and the policy of the state, confer upon cities organized under Laws 1895, c. 8, authority to license and regulate the sale by wholesale of intoxicating liquors, and that the legislature may, if it sees fit, confer such power upon municipalities, although such sales without a license are not prohibited by the general laws of the state, which make provision for licensing only the retail business of selling intoxicating liquors. It may also be conceded that the custom of manufacturers of intoxicating liquors of establishing warehouses, in the municipalities of the state, from which they sell and deliver directly to consumers their bottled wares in a greater quantity than five gallons, is liable, if not regulated, injuriously to affect public

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interests. The question, however, is not the necessity or propriety of licensing the sale of intoxicating liquors at wholesale, a legislative question, but whether the power to license and regulate such wholesale business has been conferred upon the municipalities of the state.

The general terms of the statute here in question, authorizing cities organized under it to license and regulate the sale of intoxicating liquors, must be construed according to the intention of the legislature, as gathered from the whole legislation of the state dealing with the subject of licensing the sale of intoxicating liquors, and the practical construction given to it from its inception. The legislature, from territorial days to the present time, has, for the purpose of licensing and regulating the sale of intoxicating liquors, classified such sales on the basis of the quantity sold. Chapter 20, p. 128, R. S. 1851, prohibited and punished all sales of intoxicating liquors in quantities less than one quart without a license therefor, but no license was required for sales exceeding in quantity one quart. In 1858 the quantity was increased to five gallons. Pub. St. p. 341, c. 18, § 20. In the revision of 1866 the classification was continued, and sales in quantities less than five gallons without a license were prohibited; but the wholesale traffic in intoxicating liquors—that is, in quantities of five gallons or more—was not prohibited, nor was any attempt made to require a license therefor. If, however, a wholesaler sells in quantities less than five gallons, such sales are illegal, unless he has a license. The special charters, granted to the municipalities of the state prior to the adoption of the constitutional amendment forbidding special legislation, conferred, so far as we are advised, upon such municipalities the power to license and regulate the sale of intoxicating liquors in substantially the same general language as used in Laws 1895, p. 55, c. 8, § 135, here in question; yet this is the first case presented to this court in which the claim was made that such general language authorized municipalities to exact a license for the sale of intoxicating liquors in quantities of five gallons or more.

The practical construction of such charter provisions by munic-

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ipal and state officers charged with the duty of enforcing the liquor laws of the state has uniformily been that they did not confer upon municipalities the authority to require a license for the sale of intoxicating liquors in quantities of five gallons or more. This court has repeatedly recognized this practical construction, and impliedly, at least, approved of it as correct. Thus in State v. Minnesota Club, 106 Minn. 515, 520, 119 N. W. 494, 495 (20 L.R.A.(N.S.) 1101,) the matter was summed up in these words: "The line separating the retailing from the wholesaling of intoxicating liquors is a certain quantity—five gallons—and brewers and wholesalers are not required to take out a license so long as they do not sell at retail."

The case of State v. Orth, 38 Minn. 150, 36 N. W. 103, while not directly in point, because a general statute, and not a charter provision, was under consideration, is nevertheless very cogent. The prosecution in that case was based upon a provision of the high license law (Laws 1887, p. 43, c. 6, § 4), which provided that: "Whoever sells, barters, gives away, or otherwise disposes of any spirituous, vinous, fermented, or malt liquors, without first having obtained license therefor agreeably to the laws of this state, shall be deemed guilty of a misdemeanor." It is to be noted that this language is just as general and comprehensive as the statute here in question. The prosecution in the case cited contended that the statute applied to all sales, whether more or less than five gallons, and this was practically conceded by the court, if the statute were to be construed literally, or apart from other provisions of the laws, but held:

"All the provisions of the laws in regard to procuring the license, the contents of the license, and the regulating the business, point unequivocally to the retail trade, making sales in small quantities to consumers, as the business for which a license is required; and, taking the laws as a whole, we conclude the legislature did not intend to depart from the former policy of the state, and require licenses for any but the retail trade."

We have examined the cases from other jurisdictions which appellant claims support his contention, and find that the decision in

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each case turned upon the construction of local statutes in many respects unlike our own; hence they are not in point. Construing the charter provisions here in question according to the legislative intention, as gathered from the whole legislation of the state with reference to the subject of licensing the sale of intoxicating liquors, and the uniform practical construction of such legislation, we hold that they do not authorize the licensing of the sale of intoxicating liquors in quantities of five gallons or more.

Order affirmed.

HOTEL ALLEN COMPANY v. ESTATE OF JOHN G. ALLEN.[1]

April 26, 1912.

Nos. 17,677—(63).

Renewal of sublease — condition.

Where a lessee of property sublets a portion of the leased premises, and covenants for a renewal thereof on condition that his own lease be renewed, it is not material, in so far as concerns the right of the sublessee to a renewal, whether the original lease be renewed by formal written contract or be effected by operation of law. If the lessee's term be extended in either manner, the sublessee may demand a renewal of his lease as a matter of strict right.

Renewal of lease.

A new lease to the tenant, executed a short time after the expiration of the original lease, which contained a stipulation for a renewal, *held*, on the facts stated in the opinion, in legal effect a renewal, vesting in the sublessee the right to a renewal under the terms of his contract.

Renewal of sublease — waiver of condition.

The subtenant continued in possession of the premises under the asserted right of renewal, and paid the rent as stipulated by his contract, which plaintiff accepted and received without objection. *Held* a waiver of compliance with conditions imposed by the contract precedent to the right to demand a renewal.

[1] Reported in 135 N. W. 812.

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The Allen Hotel Company appealed to the district court of Hennepin county from an order of the probate court for that county disallowing its claim against the estate of John G. Allen, deceased, for $9,450 rent. The appeal was tried before Booth, J., and a jury which returned a verdict in favor of defendant. From an order denying claimant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Latham, Pidgeon & Larson, for appellant

Benton, Molyneaux & Morley, for respondent.

BROWN, J.

John G. Allen died in January, 1910, and in proceedings for the administration and distribution of his estate the Allen Hotel Company, a corporation, presented a claim to the probate court for rent claimed to be due it from decedent, which was by that court disallowed. The hotel company appealed to the district court, where, after trial before the court and a jury, a verdict was returned against the company, and the company then appealed to this court from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

The facts, as disclosed by the pleadings and evidence, are practically undisputed and as follows:

The First National Bank of Leavenworth, Kansas, owned the ground lease and building, known as the Allen Hotel, in the city of Minneapolis, and on Jaunary 17, 1901, leased the same to J. E. Allen and G. W. Allen for the term of five years commencing April 1, 1901. On December 11, 1902, the lease was by the lessees, G. W. and J. E. Allen, assigned to the Hotel Allen Company, a corporation, plaintiff in this action. Thereafter, and on February 18, 1904, the hotel company sublet to John G. Allen, decedent, two rooms of the hotel for the term expiring April 1, 1906, simultaneously with the expiration of the lease from the Leavenworth bank. The lease from the bank contained a provision granting to the lessees the "option and privilege of a renewal of this lease for a second term of five years" upon the terms and conditions therein prescribed. The sublease from

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the hotel company to John G. Allen granted substantially the same option and privilege to the lessee; the language of this option, so far as here pertinent, being as follows:

"With the privilege of renewal for five years, should Hotel Allen Company renew its present lease on the building of which said rooms are a part, the rent in case of a renewal to be subject to an advance in proportion to such advance as the Hotel Allen Company may be compelled to pay in order to secure" its renewal.

The hotel company and decedent took possession of the property as authorized by their leases and continued therein during all the time involved in the action. On March 15, 1906, a short time prior to the expiration of the terms of the leases mentioned, the Leavenworth bank sold, assigned, and transferred all its rights in and to the property to John G. Allen, decedent, J. E. Allen and G. W. Allen, and they have since continued the owners thereof. On the fourteenth of April, 1906, the Allens executed a new lease of the property to the hotel company for the term ending December 31, 1910. At the time of the execution of this lease, decedent John G. Allen, demanded a renewal of his lease under the option granted him by the term of his former lease.

We here reach the pivotal question of the case. If the lease by the Allens, successors in interest of the Leavenworth bank, to the hotel company, was a renewal in legal effect of the former Leavenworth lease, which the hotel company had the right to demand, then that company was bound to renew the decedent's lease. The officers of the hotel company, however, refused to renew it, and informed decedent that if he continued to occupy the premises he would be required to pay rent at the rate of $150 per month. Decedent refused this, but offered to readjust the rent in harmony with any increase of rent the hotel company was required to pay under its new lease. There was no attempt to adjust the matter upon that or any other basis.

Later, and in September, 1906, the hotel company, in writing, notified decedent that from and after October 1 of that year he would be required to pay for the use of the premises occupied by

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him the sum of $300 per month. Decedent insisted upon his rights as defined by his written lease, and declined to pay the increased demand. He continued to occupy the premises until the time of his death, some four years, and paid regularly the original rental of $75 per month, which the hotel company accepted without protest, charging, however, upon its books the increased rate. Whether decedent was aware of the conditions of the books in this respect the evidence does not disclose. However, it is claimed that, as he was an officer of the hotel company corporation, he was charged with notice thereof. Upon his death the company presented the claim here in controversy and demanded the allowance thereof against the estate.

When the matter reached the district court, upon the appeal from the order of the probate court disallowing the claim, pleadings were made up pursuant to an order of the court, and upon the trial the cause was sent to the jury upon an issue presented by the complaint, namely, whether decedent wrongfully and fraudulently procured the new lease to the hotel company on April 14, 1906, for the purpose of reviving and vesting in him the right to a renewal of his own lease; the contention being that the first or Leavenworth lease terminated on April 1, and with it the right of renewal in the hotel company, and that since its right of renewal ceased on April 1, decedent's right of renewal, dependent thereon, also was at an end. No claim of this nature is presented on this appeal, and we are not concerned with any question relative to the submission of the case to the jury. We come, then, directly to the questions now urged upon our attention.

It is contended by plaintiff:

1. That the lease from the Leavenworth bank to the Allens, which was by them assigned to the hotel company, by the terms of which the lessees were given an option of a renewal for the further period of five years, terminated April 1, 1906, and was not renewed, or any notice by the hotel company that it intended to exercise the option.

2. That, since decedent's right to a renewal of his lease was con-

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ditioned upon a renewal by the hotel company of its lease, the right terminated by the failure of the hotel company to effect its renewal.

3. That in any event plaintiff was entitled to go to the jury upon the question, granting decedent the right to a renewal, whether plaintiff was not entitled to an increase of rent, because of additional payments required by it subsequent to its new lease.

There is no controversy in the evidence, and the case narrows down to a question of law upon the undisputed facts. We are unable, after full consideration of the argument of counsel, to concur in either of plaintiff's contentions.

1. The Leavenworth lease contained the following clause upon the subject of renewal: "Said lessees shall have the option and privilege of a renewal of this lease for a second term of five years upon the same terms and conditions as herein contained, except" a readjustment and revaluation in reference to the rent to be paid, and notice from the lessees six months before the expiration of the lease. This stipulation conferred upon the lessees the right to elect whether a renewal should be made, and an election by them would be final, and require of the lessor to grant the same, provided the conditions imposed were complied with. The lease and all the terms and provisions thereof were binding upon the Allens, who succeeded to the rights of the Leavenworth bank, the lessor, and they were under obligations to perform the same. Leppla v. Mackey, 31 Minn. 75, 16 N. W. 470.

It is well settled in cases of this kind that a renewal of the lease becomes operative and effectual when the lessee claims the right and is permitted to hold over, in which case a formal written renewal is unnecessary. Caley v. Thornquist, 89 Minn. 348, 94 N. W. 1084; Quade v. Fitzloff, 93 Minn. 115, 100 N. W. 660. It is also well settled that the terms and conditions upon which the lessee may demand a renewal may be waived by the parties, and when, without compliance therewith, a new lease is in fact entered into by the parties, or the tenant holds over under claim of a right of renewal, a waiver of precedent conditions follows as a matter of law. 24 Cyc. 1003.

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In the case at bar the obligations of the parties were clearly defined by the contract, and their acts and conduct thereunder determine their relative rights here in dispute. The contract should not be construed strictly and literally. The purpose of the condition of decedent's lease limiting his right of renewal upon a renewal of the hotel lease was for the protection of the hotel company, and to impose upon it the obligation to renew for decedent, if it was then in a situation to grant the same, and to relieve it therefrom in the event it was not in position to grant the extension. And in measuring the rights and obligations of the parties it would seem immaterial whether there was in form and letter a renewal of the hotel lease, or an entirely new one. It is sufficient that the hotel company was still the lessee of the property and in position to grant the extension to decedent.

But, aside from this, we are clear, on the evidence, that the new lease executed by the Allens to the hotel company on April 14, 1906, was as a matter of law, in so far as concerned the rights of these parties, a renewal of the prior lease, though for a shorter time than the hotel company had the right to insist upon. Hausauer v. Dahlman, 18 App. Div. 475, 45 N. Y. Supp. 1088; 24 Cyc. 997. The contract provided for a renewal for five years, but by the new lease the term was shortened some three or four months by the mutual consent of the parties. The new lease was practically upon the same terms as the prior lease, and imposed no new obligation. This was in legal effect a continuance of the old lease. 24 Cyc. 1020. So, whether the rights of the parties be considered from the standpoint of the hotel company, as lessee in fact, with power to renew, or from the viewpoint that the new lease on April 14 was a renewal, decedent had the right as a matter of law to insist upon a renewal of his lease, and the company was under obligation to grant it.

This conclusion is in no way affected by the additional clause in the new hotel company lease, prohibiting a subletting of the property. All parties to the transaction were bound by the terms of decedent's lease, entitling him to a renewal, and by this clause in the new lease there was no intention to abandon or modify the same.

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Decedent at all times insisted upon his rights, continuously occupied the premises under that claim, and paid regularly the rent provided for by the terms of the contract, which the hotel company accepted without protest. This constituted a waiver of compliance with the terms of the contract upon which the right to a renewal depended. It is now too late for the company to contend that it was without power to sublet the premises, or that it was under no obligation to do so because the terms and conditions upon which the right to renew was dependent were not complied with. And though decedent's lease provided for a readjustment of rent in harmony with additional payments required by the hotel company's new lease, if any were imposed, no claims of that kind were urged by the hotel company at the time decedent demanded his renewal. For aught that appears there was no occasion for such a readjustment, for no new obligations were imposed upon the company by the terms of the new lease. In the situation presented the hotel company was bound to treat decedent either as a trespasser, or as holding under his asserted right of renewal.

2. The further contention that plaintiff was entitled to recover a proportionate share of additional taxes and improvements subsequent to the new lease is not sustained. The claim was not presented on the trial below by a request for instructions to the jury or otherwise, and consequently is not now involved in the action.

Order affirmed.

JOHN F. MOORE v. WILLIAM FISHER.[1]

May 3, 1912.

Nos. 17,449—(57).

Charge to jury — punitive damages.

In this, an assault and battery case, where the evidence authorized the

[1] Reported in 135 N. W. 1126.

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jury to find that the assault was unprovoked, or that excessive force was used upon slight provocation, plaintiff was entitled to an instruction that, in the discretion of the jury, punitive damages may be included in the verdict.

Same — recovery for impaired hearing.

Upon the evidence the court properly refused to instruct the jury that plaintiff could not recover for impaired hearing occasioned by the assault.

Rulings upon evidence.

The rulings of the court upon the reception of evidence, and thereafter withdrawing the same from the consideration of the jury on defendant's motion, examined, and found without prejudice or error.

Verdict not excessive.

A verdict of $500 in this action, which may have included, not only damages for physical and mental pain temporarily resulting from the assault, but also for impaired hearing and punitive damages, *held* not so excessive as to indicate that it was prompted by passion or prejudice.

Action in the district court for Benton county to recover $2,000 for assault and battery. The reply denied that plaintiff ever conducted himself in an offensive way towards defendant's wife while he was working at her dwelling house or that he attempted an assault upon defendant. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $500. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Stewart & Brower, for appellant.

J. D. Sullivan, for respondent.

Holt, J.

Plaintiff sued defendant for assault and battery, and recovered a verdict of $500, which the trial court refused to disturb, and this appeal is the result.

In the erection of a dwelling house for defendant's wife, plaintiff worked as a bricklayer for the contractor. In the afternoon of September 8, 1910, while engaged in lining the fireplace with fire brick, Mrs. Fisher, believing he was using mortar, instead of fire clay, to lay the brick in, telephoned for her husband, the defendant. He

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came, and ordered plaintiff to get off the premises. Plaintiff answered he would not do so, or would not till he got damn good and ready, as defendant claims. At that defendant struck plaintiff with his open hand on the side of the face, then grabbed him around the throat, and dragged or pushed and partly carried him some twelve or fourteen feet out of the building. Plaintiff received scratches on the neck, and claimed to have suffered from the effects of the assault for some days, but continued to work right along. He also claimed that he was rendered deaf in the left ear from the blow, but admits that he was hard of hearing in both ears before. Defendant's experts state that he hears with the left ear, but that it is somewhat more defective than the right. The defense pleaded was that plaintiff struck at defendant with the trowel he was using when the angry words were passing, and the force used by defendant was no more than necessary for protection. Besides defendant's wife, two or three fellow workmen on the premises saw the affray. Plaintiff is a small man over fifty years old. The defendant is forty-one years of age, large, strong, and, as he puts it, able to take care of himself.

The errors assigned and urged are: Submitting to the jury whether punitive damages might be given; refusing to instruct that no allowance could be made for impaired hearing; permitting a physician called by plaintiff to testify that he found a perforation of the left ear drum three months after the assault, and not striking this testimony from the record; and that the damages are excessive.

Plaintiff was entitled to insist on his version of the affray, and the jury had the right to accept it as true. According to that, plaintiff was doing his work properly and as directed by his foreman. The defendant, called by his wife from a distance, came up to plaintiff and with a curse told him to get off the premises. Plaintiff had not had any words with defendant's wife, and there was no occasion for anger, except a belief that plaintiff was using ordinary mortar, instead of fire clay, in lining the fire box. No attempt was made by defendant to find either plaintiff's employer or his foreman before ordering him away. The only provocation defendant claims for the

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assault is that plaintiff stuck up his trowel to within a few inches of his face and declined to leave till he "got damn good and ready." Defendant did not rest content with a slap or blow, which the alleged taunt of plaintiff provoked; but he grabbed plaintiff by the throat, and pulled and partly carried him out of the building, till defendant's wife interfered, as she admits. After the affray was over, defendant's frame of mind and knowledge that he had deliberately invaded plaintiff's rights is indicated by his retort to plaintiff's threat to make him smart for it that he (defendant) had the price. Defendant was conscious of his superior strength and ability to take the law into his own hands as against plaintiff, if he so chose.

The jury had a right to believe plaintiff that there was no provocation whatever for the assault in the work, in the language, or in the attitude of plaintiff. If so, no criticism may be offered to the conclusion that the assault was wilfully malicious and a wanton violation of plaintiff's rights, warranting the imposition of punitive damages in the discretion of the jury. The record brings the case within the rule announced in Baumgartner v. Hodgdon, 105 Minn. 22, 116 N. W. 1030, and the cases there cited.

That plaintiff's hearing was more impaired in the left ear than the right, defendant's experts apparently found true. Plaintiff testified that the blow made him deaf in the left ear. The opinion of his own medical expert was that the hearing in the left ear was gone. In this situation the court would not be warranted in giving this instruction to the jury, asked by defendant, namely: "The evidence in this case shows conclusively that plaintiff's hearing in his left ear was not affected by this alleged assault on the part of defendant, hence no allowance to the plaintiff can be based on the alleged loss or impairment of his hearing." The jury were not bound to take the opinion of the defendant's experts as against plaintiff's testimony on the effect of the blow on his hearing.

On the trial plaintiff called a physician, who testified, against the objection of defendant, that three months after the affray he made an examination of plaintiff, and then found a perforation of the left ear drum, which, however, was perfectly healed at the time of the

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trial. When the court permitted the testimony, it was on counsel's promise that he would supply proof which would connect it with the blow given by defendant. At the conclusion of the testimony, defendant's counsel, deeming that the promised proof had not been supplied, moved the court to strike all testimony of perforation of the ear drum from the record. Over four pages of printed matter show the full discussion of counsel and the court's ruling thereon, which was: "I shall grant the request to the extent that there is no evidence tending to show that the rupture of this ear drum existed or was caused on September 8, at the time of this transaction." The motion, argument, and ruling occurred apparently in the presence of the jury, but no further instruction was given or asked for in regard to this testimony. If the ruling made was considered not a sufficiently explicit direction to the jury to eliminate the testimony, the court's attention ought to have been called thereto. Not having done so, defendant is not in a position to predicate error on the action of the trial court. But, furthermore, we are of the opinion that the jury could get no other impression from the discussion and ruling than this: That as a matter of law there was no connection shown between the assault and the perforation of the ear drum found three months later, and that hence the testimony of the perforation should be wholly disregarded.

The contention is also made that the damages are so excessive as to indicate passion and prejudice. Actual damages included pain and suffering, both physical and mental. The humiliation and mental suffering caused by such handling as defendant subjected plaintiff to in the presence of his fellow workmen may be estimated by a jury at a substantial amount. Then, as hereinbefore stated, the jury may have found that the blow caused impairment of plaintiff's hearing, authorizing damages in a considerable sum. If the jury included punitive damages in the verdict, as might have been done, we are not informed of the amount thereof. There is no evidence as to defendant's financial ability, except his boast at the time of the affray that he had the price. But, on appeal, error must be shown. We cannot assume that defendant is in such financial circumstances that a sub-

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stantial sum imposed as punitive damages would be excessive. The jury and trial court, residents of the same county as the parties, and observing them at the trial, are no doubt in better position to say what damages are proper, both by way of compensation and punishment, if any, than this court; and, while a smaller verdict would have appealed more to us, still we cannot say, on this record, that a verdict of $500, approved by the trial court, is so excessive as to indicate passion or prejudice on the part of the jury.

Order affirmed.

DAVID HARTIKKA v. D. G. CUTLER COMPANY.[1]

May 3, 1912.

Nos. 17,470—(59).

Grant of new trial — review on appeal.

Where the trial court grants a new trial on the ground that its instructions to the jury were misleading and prejudicial to the moving party, the order will be reversed only when it appears that the conclusion of the trial court was clearly without substantial foundation.

Questions for the jury.

The questions of defendant's negligence, decedent's contributory negligence and assumption of risk *held*, on the evidence, questions of fact for the jury.

Action in the district court for St. Louis county by the administrator of the estate of Matti Karilainen, deceased, to recover $5,000 for the death of his intestate. At the close of the testimony defendant moved for a directed verdict. The court denied the motion. The case was tried before Cant, J., and a jury which returned a verdict in favor of defendant. From an order granting plaintiff's motion for a new trial, defendant appealed. Affirmed.

Spencer & Marshall, for appellant.

O. J. Larson, M. E. Louisell and *John Saari,* for respondent.

[1] Reported in 135 N. W. 1005.

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BROWN, J.

Action for personal injuries, in which defendant had a verdict and appealed from an order granting a new trial.

Defendant is a corporation engaged in the business of dealing in salt, lime, cement, and building material at Duluth, this state. It owns and operates a large warehouse in which are stored articles kept for sale, and from which shipments are made. The warehouse is connected with the Northern Pacific Railway tracks by a spur running therefrom to the warehouse, over which cars are moved to the warehouse to be loaded and unloaded. The warehouse is on lower ground than the railroad tracks, and there is a grade of one and one-half feet to the hundred leading to the warehouse. The spur track is owned or exclusively controlled by defendant. It was customary for the railway company to switch cars onto the spur track whenever ordered by defendant, which, to prevent running down the grade, were either blocked, or the brakes set, some distance from the warehouse. Usually a string of three or more cars were so placed on the spur track at a time. Prior to the day of the accident here complained of a string of three cars had been placed on the spur track, and they were blocked, by placing a piece of wood in front or setting the brakes of the leading car, and by this means held stationary.

It became necessary to take one of these cars to the warehouse to be loaded with material to be shipped out, and defendant's general foreman undertook, with a crew of other employees, including decedent, to remove it. The foreman had entire supervision and control of the matter, with power and authority to direct and control the other employees. It had been the custom, when a car was so to be taken to the warehouse, to uncouple it from others to which it might be attached, remove the block in front of the wheels, or release the brakes, as the case might be, secure the remaining cars to prevent running down the grade, then by means of a pinch bar start the released car in motion, and with the assistance of the men pushing it down to the warehouse. The track was uneven below where the cars were stationed on this occasion, and the pushing of the men was necessary to the movement of the car over the uneven places in the track.

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The car was released on this occasion, started in motion, and decedent and other employees were directed by the foreman to push it to the warehouse. Decedent took a position at the rear end of the car, immediately in front of the drawbar, with fellow employees on either side, and was complying with the orders given him, when, without notice or warning of any kind, the cars remaining started down the grade, colliding with the one being moved to the warehouse, and crushing and injuring decedent so severely that he subsequently died. The reason for the movement of the remaining cars was clearly shown to have been the failure properly to block the wheels thereof or set the brakes after the removal of the car being taken to the warehouse.

The complaint sufficiently alleged negligence on the part of defendant to justify a recovery, if sustained by the evidence. The defense was that decedent was guilty of contributory negligence, assumed the risks, and that whatever negligence the evidence disclosed was that of a fellow servant, for which defendant was not responsible.

The court charged the jury in part as follows:

"At the time of receiving the injuries which caused his death, the deceased was in the employ of the defendant. He was engaged with other workmen in pushing a railway car along a track in the vicinity of defendant's warehouse. While so engaged, a car in the rear, upon the same track, from some cause moved forward, collided with the car which the deceased was pushing, and crushed him between the two cars in such manner as shortly to cause his death. That alone would not entitle his administrator to recover in this action. There might be no more right of recovery against the defendant under such circumstances than against one of you."

On the motion for a new trial the learned trial court was of opinion that the latter part of this instruction was erroneous, at least misleading and prejudicial to plaintiff, and for that reason granted the new trial. If the trial court intended by this instruction to say to the jury that the happening of the accident—that is, the fact that the remaining cars for some reason unexplained started in motion and

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ran down the grade, colliding with the other car—was no evidence of negligence, the court was in error.

The case of Olson v. Great Northern Ry. Co. 68 Minn. 155, 71 N. W. 5, in its substantial facts, is similar to the case at bar, and it was there held that the unexplained movement of the cars left standing was prima facie evidence of negligence. The doctrine of that case has been followed and applied in subsequent decisions. 4 Notes to Minn. Cases, 244.

The trial court was of opinion that the jury was misled by this instruction, resulting in prejudice to plaintiff; and though the question is not free from doubt, in view of subsequent portions of the charge, which are exceedingly clear, we are not disposed, in view of the rule guiding us in cases of this kind, to disturb the action of the trial court. Much must be left to the sound judgment of that court upon questions of this character, and a reversal will be ordered only when it appears that the conclusion of prejudice made the basis of the new trial was clearly without reasonable or substantial foundation. Demueles v. St. Paul & N. P. Ry. Co. 44 Minn. 436, 46 N. W. 912. If the trial court had denied a new trial, it is doubtful whether a reversal would have been ordered on this particular point. But we give force to the advantageous position of the trial court in determining the question of prejudice, and sustain the order.

In view of a new trial, it is deemed inadvisable to enter into a discussion of the evidence. We need only say that, within the doctrine laid down, and frequently applied, in numerous of our decisions, the evidence presented questions of fact upon defendant's responsibility, as well as upon the question of decedent's alleged contributory negligence and assumption of risk. Barrett v. Reardon, 95 Minn. 425, 428, 104 N. W. 309; Cody v. Longyear, 103 Minn. 116, 114 N. W. 735; Lohman v. Swift & Co. 105 Minn. 149, 117 N. W. 418; Tendall v. Great Northern Ry. Co. 113 Minn. 474, 130 N. W. 22.

Order affirmed.

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JOHN ERICKSON v. GREAT NORTHERN RAILWAY COMPANY.[1]

May 3, 1912.

Nos. 17,692—(230).

Cutting of fire hose — negligence of firemen.

The firemen of a fire department in a city are not the servants or agents of the person whose property they attempt to save from fire, so that their negligence in failing to take the proper course in the extinguishment of the fire avails one who by a negligent act cut off the water supply by which the fire was being successfully subdued, and thereby proximately caused the destruction of the property.

Injury to hose at railroad crossing — pleading and proof.

Where a railway track is laid across a traveled public street in a city, a duty arises on the part of the railway company using it to exercise ordinary care to discover and avoid injury to persons or property rightfully on such crossing, so that where a fire hose laid by the fire department of such city across the crossing to extinguish a fire is cut by the railway running its locomotive over it, thereby interrupting the effort to extinguish the fire and causing destruction of the property, it is not necessary for the owner thereof, in order to recover damages for the loss, to plead and prove wanton negligence of the railway company in cutting the hose, or prove that the person operating the locomotive had actual knowledge of its presence on the crossing. It is sufficient to prove that the failure of the railway company to use ordinary care caused the cutting of the hose and resulted in the destruction of the property.

Action in the district court for Clay county to recover $60,000 damages for defendant's negligence in running a locomotive or train of cars over and cutting a line of fire hose laid across its tracks, and thereby preventing the extinguishing of the fire mentioned in the

[1] Reported in 135 N. W. 1129.

[Note] As to duty of steam railroad, or street railroad, company to avoid interference with extinguishment of fire, see notes in 12 L.R.A.(N.S.) 382; 20 L.R.A.(N.S.) 1110.

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opinion. The answer alleged that if any line of hose lying across defendant's track was cut, it was not done through any negligence of defendant. The reply was a general denial. The case was tried before Taylor, J., who, at the close of plaintiff's case and again at the close of the testimony, denied defendant's motion for a directed verdict and a jury which returned a verdict in favor of plaintiff for $22,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

J. D. Sullivan and *M. L. Countryman,* for appellant.

Christian G. Dosland and *Barger & Hicks,* for respondent.

HOLT, J.

The right of way of the defendant railway company, with three tracks thereon, is located directly south of and almost parallel with First avenue, in the city of Moorhead, Minnesota. This avenue runs east and west. At right angles thereto is Eighth street, running north and south, being the most traveled street going in that direction in the city. Front street is one block south of First avenue. Prior to the fire on January 2, 1911, plaintiff was the owner of Columbia Hotel, located between Front street and defendant's right of way. The main part was a three-story brick building one hundred four feet long on Front street and forty feet wide. On the easterly side, and projecting closer to Eighth street than the main building, had been added two brick-veneered two-story structures, so that the northerly end of these additions were within one hundred feet of defendant's tracks. A frame structure fifteen feet by seventeen feet, two stories, containing a washroom and toilets, was built in the angle formed by the main building and additions. Between it and the main building was a 6-foot passageway; but it was built against the addition, with doors opening into the same.

About seven o'clock in the morning of the date mentioned smoke was noticed in the hotel, and shortly after a fire alarm was turned in. It appears there were only two regularly employed men in the fire department. One of these had charge of and drove the hose cart. The alarm was promptly responded to, the hose was attached to a

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hydrant at the northeast corner formed by the intersection of Eighth and Front streets, and then taken in through the main entrance of the hotel on Front street; but no fire, only smoke, was found there. The hose cart was thereupon driven north on Eighth street, and another hose attached to a hydrant located north of defendant's tracks, at the northeast corner of First avenue and Eighth street, and run south on the last-named street across the tracks, then behind the hotel to the frame building mentioned, containing the toilets, wherein the fire had in the meantime been located. The water was turned on, and the fire was being brought under control, when the defendant backed a locomotive in a westerly direction from the depot, situate some two hundred feet east of the east line of Eighth street, over and across the street where the hose was laid, and cut it. Before the cut section could be removed and other hose substituted, ten to twenty minutes elapsed, during which time the fire gained such headway that not only the frame structure where it started was destroyed, but practically the whole hotel.

Plaintiff sued, alleging that the defendant negligently cut the hose; that, had it not so done, the fire would have been put out with but small loss; consequently the claim is that defendant's negligence was the proximate cause of the destruction of the hotel. The trial resulted in a verdict for plaintiff, and defendant appeals from the order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

At the trial it appeared that at the crossing in question defendant had safety gates, operated by a watchman from a tower some ten feet high, located immediately north of the tracks and on the east side of Eighth street. When the hose was laid across the track, one of the firemen, who knew that the watchman was very deaf, pointed to the hose and motioned up and down the track. He testified that the watchman looked at him and toward the smoke from the fire. Because it did not appear that this watchman gave any notice to the engineer in charge of the locomotive which cut the hose, the court instructed the jury that any notice or knowledge the watchman may have had of the situation was immaterial. Unless a recovery must

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be based on the wanton negligence of the engineer, we fail to see why the evidence was not admissible.

The watchman was there to guard against persons or property on the crossing. If he knew that the hose was on the crossing, and from the motion of the fireman and the situation knew that trains were not to pass, it would seem a duty devolved on him to act, and a failure so to do would tend to show negligence of defendant. The ruling testifies to the great care taken by the learned trial court, in a case presenting the application of the law of negligence to a somewhat novel situation and involving a large amount, to eliminate everything which by inference might be claimed to be unfair to the defendant.

Contributory negligence was not pleaded. It was not assigned as a ground for a new trial, nor is an assignment of error on that basis made in this court. But counsel, in his oral argument, contended, as we understood him, that it appeared from the evidence received without objection that there was no necessity for laying the hose across the tracks, that after it was there the engineer was not notified by the firemen of its presence, that this was negligence of the firemen, and they were plaintiff's servants in the matter of extinguishing the fire; hence their negligence is imputable to plaintiff, and no recovery may be had. Hill v. Minneapolis Street Ry. Co. 112 Minn. 503, 128 N. W. 831; Mellon v. Great Northern Ry. Co. 116 Minn. 449, 134 N. W. 116. The answer to the contention is that the court, at defendant's request, submitted the question of apparent necessity of running the hose across the tracks to the jury, ruling that, if it was not necessary, plaintiff must fail; and, further, we are of the opinion that plaintiff is not responsible for the negligence of the fire department.

It must be borne in mind that, while a fire department protects the private property threatened, it is one of the public governmental agencies of the city, for whose mistakes or negligence in subduing a fire the city is not liable to the individual injured thereby. This is placed on the ground that the department, in arresting fires, is discharging a public governmental or police duty. Bryant v. City of St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. St. 31; Grube v.

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City of St. Paul, 34 Minn. 402, 26 N. W. 228. A fireman is not a servant of the owner of the property he is attempting to save, so as to come within the protection of chapter 7, p. 99, Laws of 1893, "An act for the protection of employees." Hamilton v. Minneapolis Desk Mnfg. Co. 78 Minn. 3, 80 N. W. 693, 79 Am. St. 350.

The citizen whose property is threatened with destruction has absolutely no control over the public fire department fighting the fire. He may not interfere by attempted directions or orders. Indeed, his property may be destroyed if, in the judgment of the head of the department, it becomes necessary so to do to arrest a conflagration. Where there is no authority in an individual to interfere with or direct such a public governmental agency as a city fire department in the discharge of its duties, nor any responsibility is resting upon him as a taxpayer in the city to pay for the negligence of such agency, it follows that there is no relation of master and servant, or principal and agent, so as to transfer the negligence of the fire department to the owner of the property being consumed by fire, making available the defense of contributory negligence to one whose negligence caused or concurred in causing the loss. Mott v. Hudson River, 21 N. Y. Super. Ct. 345. In this view of the case, the court did not err in refusing to give defendant's first and third requests, which were that no recovery could be had, if there was no need of running the hose across the tracks.

Upon the oral argument counsel for the defendant candidly conceded that he could not attack the finding of the jury that the cutting of the hose caused the almost total destruction of the hotel, and that, had it not been cut, the fire would have been extinguished with but a small loss. And the record amply sustains the verdict that plaintiff's loss in the amount found proximately resulted from the fact that defendant ran the locomotive over the hose.

We come, then, to the decisive question on this appeal, which is the refusal of the court to instruct the jury, at defendant's request, that "before the jury can find a verdict in this case against defendant they must be satisfied by a preponderance of the evidence that defendant's engineer, Kilbain, actually knew, when he backed his en-

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gine and tender from the depot west over the Eighth street crossing, of the presence of this hose in time to have avoided running over it," and instead charging them in substance that it was not the duty of the engineer to look for hose stretched across the track, but, if he knew that a hose in use to put out a fire was across the track, it was his duty not to cut it if he could avoid doing so without danger to himself or other persons. If he did not know that it was across the track, but did know that a fire was in progress in the city near the track, and knew that the situation and conditions were such as to make it reasonable to anticipate that his engine might interfere with the work of extinguishing the fire, and after such knowledge he failed to exercise ordinary care under the circumstances to avoid cutting the hose, actionable negligence might be found. We are of the opinion that the court submitted the issue of defendant's negligence to the jury upon quite as favorable theory as it was entitled to.

The contention of the defendant that the rule of wanton negligence should have been applied cannot be sustained. The defendant did not own the ground where the hose was. It was a public street. The firemen have generally the right of way in public streets in going to a fire, and in stringing hose thereon a lawful use is made of the street. Indeed, if a necessity therefor exists, hose may be laid on private property and across railway right of way to subdue fires. So that, as far as defendant was concerned, the hose was on the tracks by right, and not by the act of either a licensee or a trespasser. The hose, then, being where it might lawfully be laid, and used at a place where defendant had not the exclusive right to be, but where the public has the right to travel, a duty was thereby cast upon defendant to exercise ordinary care in its use of the crossing.

If, without fault of the owner, a large van had, in broad daylight, been stalled on defendant's tracks on this crossing, and this locomotive, with tender, starting from a standing position two hundred feet away, had backed down upon the van, could there be any escape from liability? The duty of the defendant, using the crossing, to exercise ordinary care to discover the presence of the obstruction thereon, and avoid injury or collision, is the same in the case of a van as in the

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case of fire hose strung over it. The difficulty of discharging this duty may vary. If, however, in a given case, the ordinarily prudent person, mindful of this duty of care, would, under the situation shown, discover the danger and avoid collision, and the defendant in such case fails so to do, negligence is proven.

The defendant's engineer was familiar with the streets and tracks, and had so been for several years. He had stayed at the hotel overnight, and knew of the presence of smoke, or the smell thereof, when he left for the depot, where the locomotive was awaiting him. He waited in the depot some ten minutes for orders. The fire whistle blew. He claims he did not hear it. The testimony is that quite a volume of smoke came from the fire when he started to back the locomotive; also that, as he proceeded, he looked at the smoke. Volunteer firemen and others were going to the fire, or were around there. Though his view of the hotel was at some position of his travel obstructed, he had a clear view of the rear of the hotel for about one hundred feet before reaching the hose. It was broad daylight, and he could have seen the hose, he admits, had he looked for it, at a distance of more than two hundred feet. He claims he looked at the crossing. No one was on the front part of the tender. The fireman on the locomotive was not called, nor his absence from the witness stand explained. These and other facts appearing in the evidence made a case for the jury upon the question of defendant's negligence in running over the hose.

We are cited to the case of Clark v. Grand Trunk, 149 Mich. 400, 112 N. W. 1121, 12 An. Cas. 559, as supporting defendant's contention, and so it does; but no substantial reason is given for the ruling, and we are not inclined to follow it. In the case of American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 143 Fed. 789, 75 C. C. A. 47, 12 L.R.A.(N.S.) 382, 6 An. Cas. 626, relied on by defendant, it will be noticed that there was no hose laid across the track. The train was stopped because the fire department wished to lay the hose across defendant's right of way at a place abandoned as a street, but through some misunderstanding of the engineer the train started up and interfered for some minutes with laying hose

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where the fire could be successfully extinguished, and, furthermore, this language used therein [at page 794] seems to sustain the view we adopt: "They [railroad company] would have no right to run across hose observed, or which ought to have been observed, lying across the tracks for the purpose of extinguishing a fire." The case of Metallic v. Fitchburg, 109 Mass. 277, 12 Am. Rep. 689, does not assist defendant. The points for decision were whether the hose was lawfully placed over defendant's tracks and whether the cutting of it by defendant was the proximate cause of the loss.

We discover no error in the record, and the order appealed from is affirmed.

SHELDON-MATHER TIMBER COMPANY and Another v. ITASCA LUMBER COMPANY.[1]

May 3, 1912.

Nos. 17,542—(111).

Findings sustained by evidence.

Evidence in action for conversion of logs considered, and *held* sufficient to sustain the trial court's findings of fact.

Conversion of logs — decision sustained by findings.

Findings of fact *held* to support conclusion of law that the defendant was guilty of converting the plaintiffs' logs.

Same — sale to third person.

Where a lumber company agreed and undertook to drive certain logs to its hoist, and there scale them and pay for them at a certain price per thousand feet, an unauthorized disposition of such logs to third persons without so scaling them and paying therefor, as provided in the agreement under which it received them, constituted a conversion.

Unmarked logs not abandoned.

Where logs not marked with a recorded mark were delivered to a lumber company under an agreement whereby such company undertook to drive

[1] Reported in 135 N. W. 1122.

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them to its hoist, where they were to be scaled and paid for, as between the owner of the logs and the company so undertaking to drive them, the logs were not, during the drive "abandoned," within R. L. 1905, § 2580; and the owner of such logs was not precluded from claiming a conversion thereof by such company at its hoist.

Contractor cannot take advantage of its own fault.

Where, during the drive, some of the logs were left along the river and failed to reach the hoist, the company, which agreed and undertook to drive them, was, when sued by the owner for a subsequent conversion by disposition thereof to a third party, precluded from setting up an "abandonment," under R. L. 1905, § 2580.

Action in the district court for St. Louis county to recover $1,012.77 for conversion of a quantity of saw logs. The answer was a general denial. The case was tried before Dancer, J., who made findings as set forth in the opinion and as conclusion of law ordered judgment in favor of plaintiffs. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

Powell & Simpson, for appellant.

Fryberger & Fulton, for respondents.

PHILIP E. BROWN, J.

Action for the conversion of certain logs, known as the "Cameron logs," and otherwise designated as the "white paint timber," alleged to have been the property of the plaintiffs, but wrongfully converted by the defendant in disregard of the plaintiffs' rights. The alleged conversion was denied, and the cause tried to the court without a jury, and findings made in favor of the plaintiffs. From a judgment rendered thereon the defendant appealed.

The court, after finding the corporate character of the parties, further found as facts: That during the logging season of 1909–1910, one Cameron cut and banked upon the ice of Battle lake, in Itasca county, seventy-five thousand twenty feet of pine timber, all of which was marked on the end of the log with three spots of white paint; that prior to the cutting and banking of the said timber the said Cameron had cut and banked upon the said ice a large amount

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of other timber, which the plaintiffs had sold or agreed to sell to the defendant, and which was all duly marked by a mark different from the three spots of white paint above mentioned; that thereafter, and while all of the said timber was so banked on the said ice, it was agreed between the plaintiffs and the defendant that the latter should take possession of the said white paint timber, intermingled as it was with the other timber which the said defendant had contracted to purchase, and drive the same from the point where it should take possession thereof down the Big Fork river to a point thereon where it had its hoist for taking timber from the said river, and there take the same from the river, scale it, and pay the plaintiffs therefor at the rate of $13.50 per thousand feet; that thereafter, and subsequently to the making of such agreement, the plaintiffs purchased the said white paint timber from the said Cameron, and became and remained the owners thereof until the conversion by the defendant took place; that after such purchase by the plaintiffs of the said white paint timber they delivered all of the said timber which they had agreed to sell to the defendant, including the said white paint timber, to the defendant in a boom in Deer lake, Minnesota, where the defendant took charge of the same, and thereafter transported or drove a part thereof down the Big Fork river to its said hoist, took from the river at such point a portion of the said white paint timber, and, without scaling it, or any part thereof, transported it by railroad to the Mississippi river in the vicinity of Deer river, Minnesota; that the balance of the said white paint timber the defendant failed and neglected to drive to its said hoist, and failed to have the same there scaled or taken from the river, but, without the consent of either of the plaintiffs, entered into a contract with the Shevlin-Mathieu Company, relinquishing to the latter all control over that part of the said white paint timber not so removed from the river, together with a large amount of other timber of its own, all of which was then lying in or along the river above the said hoist, and pursuant to such contract the defendant permitted and allowed the said Shevlin-Mathieu Company to take possession of all of the said timber, and to drive the same to its own

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mill, and there dispose of it in such manner as it saw fit; that in the said contract between the defendant and the said Shevlin-Mathieu Company it was agreed that the latter should scale the said white paint timber at its mill and pay the defendant the value thereof, for which the defendant intended to account to the plaintiffs for the amount it might so receive therefor; that in the manner above described the defendant converted all of the said seventy-five thousand twenty feet of white paint timber, and that the reasonable value thereof was the sum of $1,012.77.

The only assignments of error in the record which attempt to challenge the above findings are as follows, the first of same being the only one effective for that purpose:

"The court erred in finding as a fact that the defendant relinquished and turned over to the Shevlin-Mathieu Lumber Company a portion of the logs found to have been cut by one Cameron, marked on the end with three spots of white paint, and intermingled with the other timber being driven by the defendant."

"The court erred in finding as a fact that the defendant converted all of the said timber alleged to have been cut by Cameron, and marked with the spots of white paint."

We have carefully examined the record, and hold that the evidence fairly tends to support the said findings.

2. The next question is: Do these findings support the trial court's conclusion of law that the defendant converted the said white paint timber? The facts thus found show (1) an agreement by the defendant to take possession of the said white paint timber, to drive it to its hoist for scaling, and to pay the plaintiffs therefor, and a taking of possession of the said timber by the defendant under such agreement; and (2) the defendant's subsequent violation of its agreement in appropriating the logs which arrived at its hoist, without scaling them as agreed, and its disposition of the remainder, which did not so arrive at the hoist, without the plaintiffs' consent, to the Shevlin-Mathieu Company. Such, then, being the facts, the appropriation which took place at the hoist presents merely the ordinary case of where one in lawful possession of the property of another

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exercises, without the consent of the owner, dominion over the same inconsistent with the owner's right of property therein. Such an act constitutes a conversion, and on the facts found the trial court was right in so holding, and also in its order for judgment in the plaintiffs' favor. Merz v. Croxen, 102 Minn. 69, 112 N. W. 890; Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950; McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679; Kloos v. Gatz, 97 Minn. 167, 105 N. W. 639.

3. If no other questions were involved, what we have said above would dispose of this appeal. It was established on the trial, however, that the marks on the white paint timber had not been recorded as provided by R. L. 1905, § 2580, the here material portion of which reads as follows: "All logs and timber found in the waters of any lumber district, not in the possession or under the control of any person, which have no distinctive mark, or marks, which are not recorded in the proper district, shall be deemed abandoned, and shall not be recognized as property by the courts." The defendant's contention is based on the language of the statute above quoted, and the point is made that the evidence established that the plaintiffs had no title to the said white paint timber at any of the times when the alleged conversion occurred, and that for this reason the plaintiffs cannot recover. In other words, the contention is that under the statute the said timber became "abandoned" when it passed out of the boom where the defendant first took possession thereof. But taking, as we must, the findings above set out as true, this contention cannot be sustained.

The section of the statute above quoted was recently considered by this court in Cotton Lumber & M. Co. v. St. Louis River D. & Imp. Co. 115 Minn. 484, 132 N. W. 1126. It was there held that the statute has no application to logs not in the water, or which are in the possession or under the control of any person, and nothing here need be added to what was there said. It appears that the logs which the defendant appropriated at its hoist were under its own control from the time it received them in the boom on Deer lake until its appropriation thereof at the hoist, and hence under the rule in Cot-

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ton Lumber & M. Co. v. St. Louis River D. & Imp. Co. supra, the statute manifestly does not apply to the logs there appropriated.

The defendant contends, however, that as the court found the value of all of the said white paint timber, without any attempt to separate the value of that which was taken from the river at the hoist from the value of that which was left along the river, and ordered judgment for the lump sum so found, and that as there is no evidence in the record upon which to base a finding of the separate values, respectively, of the timber which reached the hoist and that which was left behind and subsequently disposed of to the Shevlin-Mathieu Company, the judgment appealed from cannot be sustained, either in whole or in part; and this contention must be sustained, unless it appears that such transaction with the Shevlin-Mathieu Company likewise constituted a conversion of the plaintiffs' property.

The question, then, is: Should the last-mentioned transaction be considered to have been a conversion of the plaintiffs' property? And here again we must consider the findings of the trial court to the effect that the defendant received this timber from the plaintiffs pursuant to an agreement that it would drive the same to its hoist, and that it failed so to do, and thereafter permitted the Shevlin-Mathieu Company to take possession thereof, drive it to its mill, and there dispose of it. Evidently the purpose of the agreement under which the defendant received this timber in the first instance was to insure its safe transportation to the said hoist, and hence it is apparent that, if any of the said timber should be considered "abandoned" within the meaning of the statute, such result would be due directly to the defendant's failure to perform its agreement. How, then, does it lie in the defendant's mouth to urge such an abandonment, or to say that its disposition of the timber thus left along the river was not a conversion of the plaintiffs' property? Manifestly, from our holding with respect to the timber which reached the defendant's hoist, the defendant would be held to have converted the timber now under consideration, if the same had been in its actual possession at the time of its disposition thereof, and, since it cannot be allowed to avail itself of its loss of possession through its own

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fault, it must be held liable to the plaintiffs as for a conversion, notwithstanding the so-called abandonment.

Judgment affirmed.

STATE ex rel. CITY OF ALBERT LEA v. COUNTY OF FREEBORN and Others.[1]

May 3, 1912.

Nos. 17,582—(17).

Appropriation for bridge.

Section 2, c. 378, Laws 1911, authorizes the city council of cities of the fourth class to require the county board to appropriate money from the county road and bridge fund for the building or improving of bridges on such city streets only as the county board may have designated as state roads or highways.

Upon information of the city of Albert Lea the district court for Freeborn county issued its alternative writ of mandamus, directing the county of Freeborn and the members of the county board to appropriate the sum of $2,000 from the county road and bridge fund for the building of a certain bridge, dam and retaining works, and to issue to the city of Albert Lea warrants of the county in the sum of $2,000 therefor, or to show cause why a peremptory writ should not issue. From an order, Kingsley, J., quashing the writ, relator appealed. Affirmed.

John O. Peterson and *Morgan & Meighen,* for appellant.

Norman E. Peterson and *George W. Peterson,* for respondents.

[1] Reported in 135 N. W. 975.

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START, C. J.

On the relation of the city of Albert Lea an alternative writ of mandamus was issued by the district court of the county of Freeborn commanding the board of county commissioners of the county to appropriate $2,000 from the county road and bridge fund for the building of a bridge, with dam and retaining works connected therewith, upon and forming a part of a public street in the city. The respondents appeared and demurred, and also moved to quash the writ, because it and the petition therefor did not state facts sufficient to constitute a cause of action. The demurrer and motion were sustained, and judgment entered, quashing the writ, from which the relator appealed.

It appears from the petition that the relator is a city of the fourth class, and that subsequent to April 20, 1911, the city council determined to build a bridge, with a dam and retaining works connected therewith, upon and forming a part of the street or public highway, extending across the outlet of Fountain lake, known as Bridge street, all within the corporate limits of the city; that a contract for the work had been duly let for $25,474; that the work is in course of construction, and that the contractor is entitled to $5,000 for part performance; that over $2,000 in taxes on property within the city limits was paid into the county road and bridge fund during the year 1910; and, further, that the respondents have refused to appropriate from the county road and bridge fund $2,000 for part payment on the contract, although duly petitioned therefor by the city council.

It clearly appears from the petition that the bridge therein designated, with the dam and retaining works connected therewith, is upon and a part of the street or public highway known as Bridge street, which is wholly within the corporate limits of the city; that is, the dam and retaining works are connected with the bridge, which is a part of the street. It does not appear from the petition that such street, or any part thereof, has ever been designated as a state road or highway by the county board or otherwise. The relator claims the right to have the appropriation made by virtue of Laws

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1911, p. 527, c. 378, and the sole question here is whether this act confers such right. The statute, so far as here material, is this:

"An act relating to highways, streets and bridges, wholly or partly within cities of the fourth class, providing for the expenditure of county road and bridge funds thereon, authorizing the designation thereof as state roads or state highways, and providing for state aid in certain instances.

"Be it enacted by the legislature of the state of Minnesota:

"**Designation of State Road.**—Section 1. Any road or highway or portion thereof, in any county, either wholly or partly within the corporate limits of any city of the fourth class, whether ordinarily designated as a street or otherwise, together with any bridge or bridges upon or forming part thereof, may be designated by the county board as a 'state road' or a 'state highway,' and may be built or improved either wholly or in part by the county, and state aid may be claimed and granted therefor the same as if outside such corporate limits.

"**Appropriation for Bridges.**—Sec. 2. Whenever the city council of any city of the fourth class shall determine that it is necessary to build or improve any bridge or bridges including approaches thereto and any dam or retaining works connected therewith, upon or forming part of streets or highways either wholly or partly within its limits, the county board shall appropriate such money as may be necessary therefor from the county road and bridge fund, not exceeding during any year the amount of taxes paid into the county road and bridge fund during the preceding year, on property within the corporate limits of said city. Such appropriation shall be made upon the petition of the city council. The city council shall determine the plans and specifications, shall let all necessary contracts, shall have charge of construction, and upon its request warrants in payment thereof shall be issued by the chairman of the board and county auditor from time to time as the construction work proceeds. Any unpaid balance may be paid or advanced by the city. On petition of the city council the appropriations of the county board during

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successive years may be made to apply on the construction of the same items and to repay any money advanced by the city in the construction thereof."

The relator's claim is based upon section 2, which must be construed with reference to the title to the act and section 1 thereof. The contention of the relator, briefly stated, is to the effect that the purpose of the act is to aid highways, streets, and bridges within cities of the fourth class, and that it contains two distinct sources of such aid. One source, as provided by section 1, is that highways in such cities may be designated by the county board as state roads or highways, so as to be placed in that regard on the same basis as highways outside of municipalities, and state aid claimed therefor. The other source of such aid, as provided by section 2, is that the city council by its act alone may require certain moneys, not exceeding in any year the amount of taxes paid into the county road and bridge fund the previous year, to be appropriated from such county fund to be expended on bridges and connected works which are a part of any street or highway, wholly or partly within the city, although never designated as a state road or highway by the county board.

If this construction of section 2 of the statute be accepted, there would be serious difficulty in sustaining the act against the objections that the subject of section 2 is not expressed in the title and that the basis of classification adopted is not a permissible one. We must, if it can be reasonably done, give such construction to the act as will render all of its provisions valid and give effect to all of them. It is evident that "state roads" or "state highways," as used in the title and in section 1 of the act, are highways, whether ordinarily designated as streets or not, which may be so designated by the county board for the purpose of classification and state aid to them. R. L. Supp. 1909, § 1257–9. Section 1 of the act is germane to the title, and confers upon the county board in its discretion the right to designate any public highway or street wholly or partially within the city limits as such state road or highway, so as to entitle it to state aid under the statute governing the improvement of state highways.

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Laws 1905, p. 198, c. 163 [R. L. Supp. 1909, §§ 1257—1 to 1257—12].

It would be contrary to the obvious spirit and intent of the statute for the board to designate a city street or highway, which was of local utility only; for it would be a misnomer to designate any city street as a state highway, unless it was so located or connected with the highways of the county as to be of general public utility. It is obvious that, if section 2 of the act in question was not intended to secure county aid in the building or improving of bridges, including approaches and any dam or retaining works connected therewith, on such streets only as the county board might designate as a state highway, then the city council of any city of the fourth class has the arbitrary power to compel the county board to appropriate from the county road and bridge fund money for the building or improving of any bridge on any street of the city, however limited and local its public use might be. There would be neither justice nor sense in a statute which compelled the county board to expend county money on a bridge in such a street. A construction of the act which would lead to such a result would be contrary to the manifest intention of the legislature as expressed in the title of the statute.

We accordingly hold that Laws 1911, c. 378, p. 528, § 2, authorizes the city council of cities of the fourth class to require the county board to appropriate money from the county road and bridge fund for the building or improving of bridges on such city streets only as the county board may have designated as state roads or highways.

Judgment affirmed.

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ROBERT BUNDERMANN v. AMELIA BUNDERMANN.[1]

May 3, 1912.

Nos. 17,587—(62).

Divorce — service of summons.

In divorce actions, where the summons is served personally out of the state, it is not a prerequisite that there be either the return of the sheriff or the affidavit of plaintiff or his attorney, required under R. L. 1905, § 4111.

Opening default.

Held, that the trial court erred in refusing to grant defendant's application to open a default and for leave to answer.

Appeal by defendant from a judgment of the district court for Otter Tail county, entered pursuant to the order of Baxter, J., after defendant's motion to open the default judgment and to be allowed to defend had been denied, Nye, J. Reversed.

Leonard Eriksson, for appellant.

M. J. Daly, for respondent.

Bunn, J.

This is an appeal by defendant from a judgment of the district court of Otter Tail county, granting plaintiff a divorce, after denying defendant's motion to vacate the order for judgment in the action and for leave to answer. The action was for a divorce on the ground of desertion, and the summons was served personally on defendant in Chicago, Illinois, on January 22, 1910. Due proof of service was made, and by order the court limited the time to answer to April 6, 1910. Defendant did not answer or appear, and on April 11, 1910, the case was heard, and a decision and order for judgment in favor of plaintiff filed. Judgment had not been entered on the decision at the time the application of defendant for leave to answer was made and heard.

[1] Reported in 135 N. W. 998.

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This application was based on affidavits of defendant and her attorney which tended to prove the following facts: Plaintiff and defendant were married in Otter Tail county, August 31, 1904. Plaintiff was a widower of 53, and resided in the county. Defendant was 54, and lived in Chicago. After the marriage they resided for a short time at Perham, in said county, but moved to Chicago during the year 1904. Plaintiff shortly thereafter returned to Otter Tail county, and has since lived there; defendant remaining in Chicago. In July, 1907, plaintiff brought an action for divorce, alleging desertion. Defendant answered, denying the charge. The case was tried in September, 1908, and on November 27, 1908, a decision and order for judgment in favor of defendant was made and filed. No judgment was ever entered on this decision, but December 20, 1909, pursuant to a stipulation between the then attorneys for the parties, an order was entered dismissing the action. The present action for divorce was therefore commenced three weeks after the order of dismissal. Defendant admitted the receipt of the summons and complaint in the second action, but was unable to read English, and supposed the papers had relation to the former case, which she knew had so recently been decided in her favor. She did not consult an attorney or a friend, but claims to have written a letter to the judge who had tried the case, and to have received no reply. She did not discover that the action was begun until late in December, 1910, when, in answer to a letter to the judge asking why she had received no money from her husband, she was informed that the second suit for divorce had proceeded to trial and decision.

Immediately after learning these facts, defendant retained her present counsel, who promptly made on her behalf the motion for leave to answer. The only showing made by plaintiff against the granting of the motion was in denial of his own wealth and defendant's poverty, both of which facts had been alleged in the moving affidavits. There was no denial of defendant's inability to read English, or that she did not in fact understand the import of the papers that had been handed to her in Chicago.

Defendant makes two contentions here. The first is that the court

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had no jurisdiction over defendant, because the summons was served out of the state and there was no return of the sheriff that defendant could not be found, and no affidavit of plaintiff or his attorney stating that he believes defendant is not a resident of the state or cannot be found therein. We hold that neither such return nor such affidavit is necessary in divorce actions, where the summons is served personally out of the state.

Defendant's second contention is that the trial court abused its discretion in refusing her leave to answer. The trial court assigned no reason for its order, and from the record before us we are unable to understand why the relief was refused. It is contended by plaintiff that the certificate of the trial judge does not show that the record contains all of the papers upon which the orders were based, but we cannot sustain this contention. We must therefore determine whether, on the evidence returned to us, the order can be sustained as an exercise of the discretion which the trial court possesses in the matter of opening a default. As we have often held, this discretion is not an arbitrary one. It must be exercised judicially.

It is the duty of a trial court to grant the relief in a meritorious case, where any reasonable excuse for the failure to answer is shown, a fair showing of merits made, and where no substantial prejudice will result to the other party. There is no character of action in which the courts should grant the relief more readily than a divorce action, when judgment has not been entered. The state is an interested party, and the action involves much more than mere rights of property. The policy of our law is for a bona fide and public trial, and against default judgments. In the case at bar, no judgment had been entered when the application for leave to answer was made. If plaintiff has a case which ought to prevail, he will not be prejudiced by the short delay, or by having his case contested. If, on the other hand, there is a good defense, the default results in a serious miscarriage of justice. The excuse made by defendant for failure to answer within the time limited appears to us as a reasonable one. The former action, based on the same facts, had recently been decided in her favor. This fact, together with her inability to read the papers served upon her, furnishes a reason for failure to under-

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stand that the papers meant that a second suit for divorce had been started by her husband.

In view of the showing made by defendant, and the absence of a showing made in opposition, we hold that the trial court ought to have granted the application.

Judgment reversed.

RASMUS MADSEN and Others v. OLE LARSON and Others.[1]

May 3, 1912.

Nos. 17,602—(43).

Meandered lakes — findings supported by evidence.

In proceedings to drain certain meandered lakes, under section 1, c. 230, Laws 1905, it is *held* that the findings of the trial court to the effect that the lakes are not normally grassy and of a marshy character, or no longer of sufficient depth to be of any beneficial public use, are supported by the evidence.

County ditch — appeal to district court — trial de novo.

On an appeal from an order of the board of county commissioners ordering the construction of a public ditch for the purpose of draining a meandered lake, no particular force or effect is to be given to findings of the county board as respects the character of the lake. The appeal brings the question to the district court for trial de novo, and should be there determined as though originally at issue in that court.

Objectors to petition for the construction of a ditch appealed to the district court for Otter Tail county from the decision of the board of county commissioners granting the petition. The appeal was tried before Taylor, J., who made findings and as a conclusion of law dismissed the proceedings. From an order denying their motion for a new trial, petitioners appealed. Affirmed.

John B. Thompson, for appellants.

Leonard Eriksson, for respondents.

[1] Reported in 135 N. W. 1003.

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BROWN, J.

Proceedings for the construction of a drain, under chapter 230, p. 303, Laws 1905, the result of which, if constructed, would drain the water from three meandered lakes. The petition was duly presented to the board of county commissioners, and, after due proceedings in accordance with the statutes, was granted. An appeal was taken to the district court on the ground that the lakes sought to be drained were not within the class of lakes which are authorized by the statute to be drained, and therefore that the order of the commissioners was without authority of law and unauthorized. After a trial in the district court without a jury, findings were made in harmony with the claim of appellants, and the order of the county board was reversed. Petitioners appealed from an order denying a new trial.

The assignments of error present the question whether the findings of the trial court are so clearly against the evidence as to justify a reversal of the order denying a new trial. A question in reference to the sufficiency of a remonstrance filed in opposition to the drain, referred to in the assignments of error, was not seriously pressed on the argument, and we dispose of it with the remark that no ground for reversal is there presented. The sole question is whether the findings are against the evidence.

Section 1 of chapter 230, p. 303, Laws 1905, provides for the drainage of wet and overflowed lands, upon conditions prescribed by the act, and among other things authorizes the widening or deepening of any stream or watercourse, and the lowering or draining of any lake, whether meandered or not, when necessary to the public welfare and the accomplishment of the purposes of the proposed drainage project, with this qualification:

"And provided, further, that no meandered lake shall be drained under the authority of this act, except in case such lake is normally shallow and grassy and of a marshy character, or except in case such meandered lake is no longer of sufficient depth and volume to be capable of any beneficial public use of a substantial character for fishing, for boating or public water supply."

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While the statute confers, in general terms, the power to drain meandered lakes, the proviso above quoted in full qualifies the authority and expressly limits it to a certain class of lakes, namely, those that are grassy and marshy in character, or no longer suitable for any beneficial public use. In other words the proviso expressly prohibits the drainage of lakes, unless affirmatively shown to be of the character there stated. It would seem that, in imposing this restriction upon the conferred power, the legislature intended to follow the suggestion of the late Justice Mitchell in Witty v. Board of County Commrs. of Nicollet County, 76 Minn. 286, 79 N. W. 112, where in the course of the opinion he said: "The public rights in these lakes, with which the state abounds, are of great value and importance; and if the legislature intended to grant the county commissioners authority to destroy them, it is to be presumed that it would have surrounded the grant with the most minute safeguards and limitations, so as to prevent the abuse of the power." The suggested safeguards and limitations are contained in the proviso quoted, and must be given full force and effect.

The trial court found that the lakes in question did not come within the class of lakes authorized to be drained; in other words, that they were not normally shallow and grassy and of a marshy character, or no longer suitable for any beneficial public use. A careful consideration of the record leads to the conclusion that the findings should be sustained.

As we understand the situation, there are six different lakes which will be affected by the drain, if constructed. They constitute a chain of lakes, which in former years, and perhaps at present in times of high water, were connected by natural outlets or drains running from one to the other. The upper three lakes are sought to be entirely drained by deepening the channel between them, thus permitting the waters thereof to flow into the lakes below. It is not intended to entirely drain the three lower lakes, but petitioners do ask for the deepening of the outlets thereof to such an extent as to provide for the passage of the surplus waters from the upper lakes.

The evidence upon the question whether the upper lakes are grassy

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and of a marshy character is flatly contradictory. Some of the witnesses characterized the lakes as sloughs, that they were grassy and marshy, and that the water therein was stale and stagnant, wholly unfit for use of any kind. Other witnesses gave an entirely different picture, declaring that the bodies of water were "fairly nice lakes," were not marshy or grassy, except around the shores, and that the water therein was suitable for stock and other useful purposes. But all agreed that the lakes were of a depth of from seven to ten feet, with a large open body of water. The lakes cover between eighty and one hundred acres each, with such banks as usually surround like bodies of water. In this state of the record we are unable to sustain the contention that the trial court proceeded against the evidence, or that its findings are clearly against the weight of the testimony. In fact, we are impressed that the learned trial judge could not well have found otherwise. It cannot well be said that a lake covering eighty acres of land, from seven to ten feet deep with a large, open body of water, is normally shallow and marshy. In respect to the depth and size of the lakes, there is no substantial controversy, and in other respects it is sufficient to say that the evidence is conflicting, presenting a question of fact for the trial court.

No particular effect is to be given the findings of the board of county commissioners upon this particular question. The matter came to the district court for trial de novo, and the questions presented were there to be tried and determined as though originally at issue therein.

Order affirmed.

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G. WILLIS PETERS and Another v. WILLIAM TACKABERRY.[1]

May 3, 1912.

Nos. 17,629—(40).

Adverse possession — new trial — failure to pay taxes.

Action to recover possession of land in the city of Duluth, the record title to which was in the plaintiffs, and defendant claimed title by adverse possession only. The verdict awarded the possession of only a small portion of the premises to the plaintiffs, and they made a motion for judgment notwithstanding the verdict or a new trial. The motion for judgment was denied, and a new trial granted. Both parties appealed. *Held*, that the motion for judgment was correctly denied, and the new trial rightly granted, for the failure of the court to give the plaintiffs' requested instruction to the effect that failure to pay taxes tends strongly to prove lack of claim of title.

Action by the executors of the estate of John L. Dodge, deceased, in the district court for St. Louis county to recover possession of certain real estate. The case was tried before Dibell, J., and a jury which rendered a verdict in favor of plaintiffs in the form given in the second paragraph of the opinion. Plaintiffs moved for judgment notwithstanding the verdict or for a new trial. The court denied the motion for judgment but granted the motion for a new trial. From that part of the order denying their motion for judgment, plaintiffs appealed. From the order granting a new trial, defendant appealed. Affirmed on both appeals.

Daniel G. Cash and *J. B. Richards*, for plaintiffs.

John Jenswold, Jr., for defendant.

START, C. J.

This action was brought December 3, 1904, in the district court of the county of St. Louis, to recover possession of what was for-

[1] Reported in 135 N. W. 805.

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merly the east half of Fifth Avenue East, between Superior street and First alley, in the city of Duluth. This part of the avenue was duly vacated, June 18, 1881, by decree of court, and the title thereto adjudged to be in the owner of the adjoining lot 1, block 9, Portland division, plaintiffs' testate, John L. Dodge, deceased, in whom the fee title of record to the premises was at the time of his death on May 18, 1904. The complaint in this action alleged title and right of possession in the plaintiffs. The answer denied such title and right, and alleged title in the defendant by adverse possession.

The sole issue between the parties is whether the defendant had acquired title to the premises by adverse possession prior to the commencement of this action. The issue has been tried four times. The first trial resulted in a verdict for the plaintiffs. The second trial was had upon defendant paying the costs, as provided by the statute, and resulted in a disagreement of the jury. Upon the third trial there was a verdict for the defendant, which was set aside by the trial judge, and a new trial granted. The fourth trial resulted in a verdict in favor of the plaintiffs for the recovery of the possession of the premises described in the complaint, except "112 feet running from First alley southerly towards Superior street." This verdict is in legal effect one for the defendant, for it leaves him in the possession of the whole of the premises, except the southerly twenty-eight feet in width thereof, as to which the defendant on the trial waived any claim. The whole tract is thirty-three feet by one hundred forty feet, the southerly end of which fronts on Superior street and the rear end on First alley.

The plaintiffs made a motion for judgment in their favor notwithstanding the verdict, for the possession of all of the land therein described, or, in case this was denied, for a new trial, for the reason that the verdict was not justified by the evidence, and was contrary to law, and for errors of law occurring at the trial. The trial judge made his order denying the motion for judgment, and granting a new trial. Thereupon the plaintiffs appealed from the whole order, and the defendant from the order granting a new trial.

Upon a full consideration of the record, we have reached the con-

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clusion that the order must be affirmed on both appeals, and as there is to be another trial we refrain from discussing the evidence, except so far as seems necessary to indicate the basis of our conclusion.

The parties substantially agree that after the avenue, which was sixty-six feet wide, was vacated, in 1888, the defendant moved his house onto the avenue and located it ten feet and ten inches from the alley, and a part thereof, 3.35 feet by 10.7 feet, on the east half of the avenue, or, in other words, approximately four-fifths of the house was on the west half and one-fifth on the east half of the avenue. The defendant has lived in his house ever since he moved it upon the avenue, and testified in effect that he took possession of the premises in question with the intention of claiming them as his own, and has ever since claimed and held them adversely to all persons. There was evidence on the part of the plaintiffs tending to show that he entered upon the premises by permission of one of the then owners thereof. The defendant made no claim that he ever paid anything for the premises, or had any title or right thereto, except such as he claims to have acquired by his alleged adverse possession. We are of the opinion that the evidence, as to his adverse possession of the portion of the premises occupied by the east one-fifth of his house and the land lying between it and the alley, was such that the plaintiffs were not in any event entitled to judgment notwithstanding the verdict for this part of the premises in dispute. It follows that for this reason, if for no other, the motion for judgment for the whole premises was properly denied.

It is true that the plaintiffs, after their request for an instructed verdict for the whole of the premises was denied, requested a directed verdict for the whole premises except the part thereof occupied by the defendant's house and the part between it and the alley; but such was not their motion for judgment. We do not discuss nor decide the question whether, if the motion for judgment had been based on the first requested instruction, the trial court would have been justified in denying it under the rule of Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958.

This brings us to a consideration of the defendant's appeal from

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the order granting a new trial. The evidence as to the defendant's adverse possession of the premises, other than the land on which a part of his house stands and that between it and the alley, was of such a character that it is obvious that the trial court, upon denying the motion for judgment, ought to have done just what it did do, grant a new trial to prevent a miscarriage of justice. The motion for a new trial, however, was based on the ground that the verdict was not justified by the evidence, and on two other distinct grounds. The order granting the motion did not state any reason therefor, and the contention of defendant, that the order cannot be treated as a discretionary one, must be conceded. We are, however, of the opinion that the refusal of the trial court to give an instruction requested by the plaintiffs as to evidence of nonpayment of taxes by the defendant was reversible error.

The request was this: "Payment of taxes and assessments for local improvements tends to prove claim of ownership and title to land. Likewise, total failure to pay any taxes or assessments for local improvements tends strongly to prove lack of claim of title and ownership of land by the person in possession." The trial court modified the request by striking out the word "strongly," and only gave the request as modified. The failure of a person claiming title to land by adverse possession to pay taxes thereon during the time of his possession, where the land is taxed separately from other lands, is strong and forcible evidence, though not conclusive, that his possession was not under claim of title, nor with intent to claim adversely to the true owner. Todd v. Weed, 84 Minn. 4, 86 N. W. 756; Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127.

Inasmuch as the defendant made no claim to the land, except by adverse possession, and in view of the character of the evidence in support of the claim, the plaintiffs were entitled to have their request given, unless it was fully covered by the general charge, but not necessarily in the same words. The general charge, as to the effect of nonpayment of taxes, so far as here material, was, exclusive of plaintiffs' request as modified, this:

"It is in evidence that from 1888 to 1904, some sixteen years, taxes

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were levied and assessments were made against the property in controversy, aggregating something like $2,500, which were paid by the plaintiffs, or those from whom they get title. The defendant did not pay any of them. He knew that property was assessed for taxes, that such was the custom, and that the street improvements had to be paid for. The fact that he paid none of them is proper to be considered by you as making somewhat against his claim that his occupancy was with an adverse intent, an intent to have and hold the property as his own. The argument is that men who own property usually give some regard to the taxes against it, so that it will not be lost on tax sales; and if the defendant really claimed the land he would have given some attention to accruing taxes and assessments for city improvements, as owners usually do. In connection with the fact that the defendant paid no taxes and no assessments, you will consider his explanation of it. It does not necessarily follow that his possession was not adverse because he did not pay them. He might let them go to sale, or neglect them entirely, without necessarily being held not to have claimed adversely."

It is apparent that this instruction was not the equivalent of the requested instruction, to the effect that failure to pay taxes and assessments strongly tended to prove lack of claim of title. On the contrary, the instruction as given might well have been understood by the jury as minimizing the potency of the evidence as to non-payment of taxes; for they were told that it was proper for them to consider such fact as making somewhat against defendant's claim.

The defendant claims in this connection that there was no proper exception to the refusal of the court to give the requested instruction, which was one of several others which were also refused. At the close of the charge counsel for plaintiffs excepted "to those requests of ours that are not given." There was no other exception to the refusal to give the instruction. The rule that exceptions to a charge of the court must be specific, and made before the jury retires, was intended to direct the attention of the court to the particular alleged error in the charge, so that it might be corrected if the judge was of the opinion that he had inadvertently erred. In the application of

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this rule it was uniformly held that a general exception to the refusal of the court to give several requested instructions was insufficient, because not sufficiently specific. The reason of the rule ceased upon the enactment of Laws 1901, p. 121, c. 113, and where exceptions taken on the trial are relied on as the basis of assignments of error they ought to be construed with greater liberality than they were before the reason for the rule ceased. The objection to the exception in this case is purely technical, for the record shows that the action of the trial court in modifying the requested instruction was deliberately and understandingly taken. We accordingly hold that the correctness of the ruling in refusing the requested instruction may be reviewed on this appeal.

Order affirmed on both appeals.

WILLIAM H. QUINN and Another v. R. J. JOHNSON and Another.[1]

May 3, 1912.

Nos. 17,693—(56).

Purchase in good faith — evidence.

In this action, involving the title to land, it is *held* the evidence sustains the finding that defendants purchased the land from the record owner of the title for a valuable consideration, in good faith, and without notice of certain unrecorded deeds.

Application of recording act.

Under R. L. 1905, § 3357, a subsequent purchaser in good faith for a valuable consideration, whose conveyance is first duly recorded, has the title as against a prior unrecorded conveyance, notwithstanding the fact that he purchases from the holder of an unrecorded deed from the record owner, and files for record this deed with that to himself, and thus completes the chain of title of record.

[1] Reported in 135 N. W. 1000.

[Note] Burden of proof as to bona fides of purchaser claiming against prior unrecorded conveyance or encumbrance, see note in 36 L.R.A.(N.S.) 1124.

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Action in the district court for St. Louis county to determine adverse claims. The complaint recited the facts given in the opinion, alleged a conspiracy between Maginnis, McLaughlin, Ferguson and Christie to cheat and defraud plaintiffs, and upon information and belief alleged that defendants purchased the lands with full knowledge of all the facts set out, that they paid nothing therefor, but that the conveyance was executed and received as part of the scheme to cheat and defraud plaintiffs. The answer alleged defendants had no notice or knowledge of any defects in the title or of any fraud on the part of Maginnis or anyone else. By way of counterclaim defendants alleged that the land was sold for a valuable consideration, that it is vacant and unoccupied, and plaintiffs claim some right or interest in the land hostile to defendants. The case was tried before Ensign, J., who made findings and as conclusion of law ordered judgment in favor of defendants. Plaintiffs' motion for a new trial was denied. From the judgment entered pursuant to the findings, plaintiffs appealed. Affirmed.

William B. Phelps, for appellants.

Fryberger & Fulton, for respondents.

BUNN, J.

This action was brought to determine adverse claims to an undivided two-thirds interest in one hundred twenty acres of land in St. Louis county. Plaintiffs claimed to be the owners of this interest, and defendants claimed title in themselves. The case was tried by the court without a jury, and decided in defendants' favor. Plaintiffs' motion for a new trial was denied, and they appealed from the judgment thereafter entered.

The question involved on this appeal is whether the evidence sustains the decision that defendants were purchasers in good faith and for a valuable consideration, and therefore entitled to the protection of the statute against plaintiffs' prior unrecorded deed. The material facts are as follows:

The land in controversey was on January 18, 1902, part of the public lands of the United States and subject to entry under its laws.

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On that day one McLaughlin made application for the land and filed certain "soldier's additional scrip" on the same at the land office in Duluth. February 11, 1902, plaintiffs purchased from McLaughlin an undivided two-thirds interest in the land for $320, and McLaughlin executed and delivered to plaintiffs a warranty deed to the same, which was recorded February 13, 1902. December 21, 1903, McLaughlin filed in the land office at Duluth a relinquishment of his application for said land; the fact being that the scrip was worthless and the application invalid.

Thereafter, and prior to October 1, 1904, one Maginnis filed in the local land office at Duluth certain "Santa Fé railroad" scrip and an application for the lands. This application was allowed, and it was ordered that a patent from the United States should issue on said application to the Santa Fé Railroad Company, and thereupon a patent was issued to said company. October 4, 1904, the railroad company conveyed the land to Maginnis. This deed was recorded April 18, 1905. June 15, 1908, Maginnis executed and delivered a deed of the land to Mary L. Washburn, of Seattle, Washington, who on June 22, 1908, executed and delivered a deed of the land to McLaughlin. Neither of these deeds was recorded until after the trial of the action. Plaintiff's title is based upon this unrecorded deed to McLaughlin, and the claim that the title then acquired passed to plaintiffs by virtue of the warranty in the deed of February 11, 1902.

It must be and is conceded that the title to an undivided two-thirds interest is in plaintiffs, unless defendants purchased the land in good faith and without notice of the deed to McLaughlin. This brings us to a consideration of the facts concerning defendants' title and the evidence as to good faith and notice.

June 9, 1909, Maginnis executed a quitclaim deed of the land to Robert Christie. June 18, 1909, Robert Christie executed and delivered to defendants a warranty deed of the land, in consideration of $1,500 paid by defendants. Both of these deeds were recorded June 18, 1909.

The trial court found that defendants purchased the land from the

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record owner of the title for a valuable consideration, in good faith, and without notice or knowledge of any kind of the deeds from Maginnis to Mary L. Washburn and from Mary L. Washburn to McLaughlin, or of the claims of plaintiffs. It is this finding that plaintiffs assail. They do not claim that the evidence tends to show that defendants had any actual notice of the unrecorded deeds, and there is no foundation for such a claim.

It appeared that, about a year before defendants purchased, S. F. White, a Duluth lawyer, was employed by John C. Ferguson to examine the title to the land. Ferguson was negotiating with Mary L. Washburn for its purchase, and the deed to her from Maginnis, and a deed from her executed in blank had been forwarded to the First National Bank of Duluth, to be delivered to Ferguson upon the payment of a definite sum named by the seller as the purchase price. Ferguson was unwilling to pay the price named, and the deal was not made.

A year later, when the deed from Maginnis to Christie was forwarded to the City National Bank, Ferguson approached defendants with a proposition to purchase the land. They consulted estimates as to the timber made by reputable cruisers, and finally agreed to purchase, if the title was found good, at the price of $1,500, and to give Ferguson an option to buy the land from them for $1,700 at any time on or before October 1, 1909. Defendants employed S. F. White as their attorney to examine the title. White had examined the records as attorney for Ferguson a year before, and reported to defendants that the title was good, whereupon, on June 17, 1909, defendant Smith gave to White his check for $1,500 to close the deal. White deposited this check to his own credit in the City National Bank, and drew his own check for $1,001, payable to the bank, for the purpose of paying the draft that Maginnis had drawn for the price at which he sold to Christie, with instructions to the bank to hold the check until he should telephone an order to pay it, after examining the records "to see if anything had been filed." White then took the deed from Maginnis to Christie and the deed from Christie to defendants, and, finding that "nothing had been filed" in the office

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of the register of deeds, filed the deeds for record and telephoned the bank to pay the draft, which was done. Out of the balance of the $1,500 check, White retained $50 as his fees, paid taxes and the cost of recording the deeds and bringing down the abstract, and gave his check for the balance to Ferguson.

The chief contention that plaintiff makes on these facts is that the knowledge gained by White when he examined the title for Ferguson a year before should be imputed to defendants. The great difficulty with this proposition is the entire absence of evidence tending to show that White acquired any knowledge of the Washburn or McLaughlin deeds, or of plaintiff's claim of title, when he was acting as Ferguson's attorney. He testifies positively that he knew nothing about such deeds, and Ferguson says that he did not inform him of them. White's examination of the records disclosed the deed from McLaughlin to plaintiffs of 1902, and a deed from plaintiffs to the Colquet Lumber Company; but his examination of the land office records showed conclusively that McLaughlin had no title to convey. We cannot hold that he was bound to inquire of plaintiffs, or of the lumber company, as to whether they claimed title, or as to what the basis of such claim was, or that he is to be charged with knowledge of any title or claim that such an inquiry might have given him. It is quite plain, we think, that the rule that the knowledge of an agent may be imputed to his principal has no application, for the reason that the evidence fails to show knowledge on the part of the agent, if for no other reason.

The claim that Ferguson was acting as agent for defendants cannot be sustained. Nor are we permitted to infer bad faith on defendants' part because they retained White, rather than some other lawyer, or because they intrusted him with the money and full power to close the deal if he found the title good, or because of any of the various circumstances pointed out by plaintiffs as suspicious, or as indicating bad faith. Neither is there merit in the claim that the consideration paid was so inadequate as not to constitute a "valuable consideration," or as to be evidence of bad faith. The record fails to bear out this contention. We fully assent to the principles that the registry act cannot be used as an instrument of fraud, that, if

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the circumstances are such as to inform the purchaser that some wrong is sought to be perpetrated, he cannot blindly shut his eyes and then assume the character of a bona fide purchaser, and that knowledge of facts that ought to have put the purchaser on inquiry is constructive notice of every fact that such inquiry would presumably have disclosed.

Clearly it was not necessary to show actual notice of the unrecorded deeds, and not necessary to prove bad faith or fraud by direct evidence. But it was necessary to have evidence of circumstances reasonably tending to show that defendants had notice of facts that should have put them on inquiry, or reasonably tending to show that they knew or ought to have known that there was fraud in the transaction. Certainly we cannot presume that defendants acted in bad faith, and we are clearly of the opinion that the evidence is ample to sustain the finding of the trial court in their favor.

It is contended that defendants are not entitled to the protection of the statute, because the title which they purchased was not a complete record title. This argument is based upon the fact that the patent to the railway company was not recorded in the office of the register of deeds, and upon the fact that the deed from Maginnis to Christie was not recorded at the time defendants purchased. It is impossible to see how the fact of the nonrecording of the patent can help plaintiffs. The records in the land office disclosed that it had been issued, and both plaintiffs and defendants claim title under it. Nor is there merit in the fact that the deed from Maginnis to Christie was not of record at the time the deed to defendants was delivered. It was placed of record by defendants, together with the deed from Christie to them, and completed the chain of title on the records. Clearly defendants are within the protection of the statute. R. L. 1905, § 3357. Their "conveyance" was "first duly recorded," and, if they purchased in good faith and for a valuable consideration, the unrecorded conveyance under which plaintiffs claim title was void as to them.

Our conclusion is that the findings of fact are sustained by the evidence, and that the conclusions of law are sustained by the facts.

Judgment affirmed.

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STATE ex rel. JAMES ROBERTSON v. JOHN H. STEELE.[1]

May 3, 1912.

Nos. 17,720—(251).

Motion to quash indictment — inspection of testimony.

A defendant in a criminal action is not entitled to inspection of testimony furnished the county attorney by the state fire marshal, under the provisions of chapter 203, Laws of 1911, for the purpose of making a motion to quash the indictment.

Writ of certiorari to review an order of the district court for Hennepin county, Steele, J., directing relator, as county attorney, to furnish Michael McGuirk with a copy of evidence. Reversed.

Lyndon A. Smith, Attorney General, and *Alexander L. Janes,* Assistant Attorney General, for relator.

M. C. Brady, for respondent.

HOLT, J.

By writ of certiorari, relator, the county attorney of Hennepin county, seeks to review and reverse an order made by the district court, directing relator to furnish Michael McGuirk, who is under indictment for arson in said county, with a copy of the evidence of said McGuirk, in the possession of relator, and taken before the fire marshal of the state, under the provisions of chapter 203, p. 527, Laws 1911, or give him an opportunity to examine and make a copy thereof.

The attorney for McGuirk insists that the order is not reviewable on certiorari. In this we think he is in error. The order is not made in the trial of the criminal case against McGuirk, so that it may be said to be an interlocutory order, and, even if it were, no appeal would lie in behalf of relator upon final judgment. The argument is also advanced against considering the order on certiorari that re-

[1] Reported in 135 N. W. 1128.

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lator has an adequate remedy in the writ of habeas corpus if the trial court attempts to enforce the order by punishing for contempt. But the propriety of making the order, or the abuse of discretion therein, could not be considered on such writ. State v. Bailey, 106 Minn. 138, 118 N. W. 676, 19 L.R.A.(N.S.) 775, 130 Am. St. 592, 16 An. Cas. 338. If the order could be attacked at all upon habeas corpus, except for lack of jurisdiction and authority to impose the sentence, it would certainly be necessary to resort to certiorari as ancillary thereto.

McGuirk applied to the trial court for the order here attacked by relator, in order to make a motion to quash the indictment for arson returned against him, on the ground that he was indirectly compelled to give testimony before the grand jury. He claims that he had to submit to an examination under oath before the state fire marshal; that his evidence was reduced to writing, the relator being furnished with a copy thereof; that this evidence and the information gained from him in the examination was presented to the grand jury; and he contends that he is entitled to compel the relator to give him a copy of his testimony before the state fire marshal, so as to enable him to present his motion to quash the indictment.

In so far as the person who may be accused of arson is concerned, the statute referred to (chapter 203, p. 257, Laws 1911) is, to put it mildly, unusual, drastic, and inquisitorial. But it is not proper now to decide whether or not, by compelling a person suspected of arson to submit to an examination, the purpose of the law is defeated, in that such person may not afterwards be indicted and put on trial for the crime. The question presented is: Shall a county attorney, prior to trial, be compelled to disclose the evidence he has against an indicted person?

It must be admitted that under the common law it could not be done. We have no statute which gives a defendant in a criminal case a right to demand a disclosure of the state's evidence, except as it may appear at a preliminary hearing. It is plain that section 4729, R. L. 1905, does not apply to criminal cases, because under that either party who has a document which the adversary shows

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need of inspecting may, by order of court, be compelled to permit inspection. Sections 5289 and 5290, R. L. 1905, cited by respondent herein, refer merely to a case of presentment, and not to one where an indictment has been found, as appears from the subsequent sections 5292 and 5294. We ought not, because of situations created by this chapter 203, p. 257, Laws 1911, to establish a rule that would go far toward hampering prosecuting officers in criminal trials and make conviction of the guilty exceedingly difficult.

County attorneys, as a rule, are fair-minded, and no doubt do give the accused or his attorney information and permit inspection of documents in proper cases in furtherance of justice; but if the practice be once adopted that an indicted person is entitled to be furnished with some evidence in the possession of the county attorney, where is the line to be drawn? We do not think McGuirk was entitled to the order as a matter of right. King v. Holland, 4 T. R. 691. In the absence of statute the district attorney is not bound to furnish defendant with a copy of confession made by him (Santry v. State, 67 Wis. 65, 30 N. W. 226), nor with a copy of the minutes taken before the grand jury (Howard v. Commonwealth, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; Cannon v. People, 141 Ill. 270, 30 N. E. 1027; Merrick v. State, 63 Ind. 327).

But, even if it be conceded that it was a discretionary order, we are of opinion that the record does not sustain the court in granting it. McGuirk seeks a copy of his own testimony, given a few days before the application for the order. He does not need a verbatim copy of that testimony to accomplish his disclosed purpose. The substance thereof, or perhaps simply isolated facts testified to before the fire marshal, is sufficient to show whether or not his constitutional rights were violated by the grand jury when he was indicted. State v. Gardner, 88 Minn. 130, 92 N. W. 529. If the state takes issue with defendant on a motion made to quash the indictment, the court is not limited to affidavits, and a subpœna duces tecum will bring any document into court in the possession of the witness served. The state fire marshal is the lawful custodian of the testimony taken by him, and, if anyone is entitled to examine it, applica-

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tion should be made to him for permission. Under chapter 203, p. 257, Laws 1911, he is required to furnish the county attorney a copy for use in prosecutions. The information and evidence thus furnished the county attorney is neither for the use of the public nor for the use of a person that may be afterwards indicted for arson in connection with the fire to which the evidence relates. We appreciate that if, at the trial, the defendant desires to take the witness stand, he would like to be fully advised as to exactly what he had testified to or stated in regard to the offense charged on previous occasions, and we apprehend that this is the motive for the application. But if the defendant may compel the county attorney to exhibit to him his own testimony or confession, there would be equally good reason to call on the county attorney to disclose, before the trial, all the evidence that he may have against the defendant. Our conclusion is that the order should not have been made.

Reversed.

ERICK T. NELSON v. WILLIAM H. McBRIDE.[1]

May 3, 1912.

Nos. 17,731—(252).

Election ballot — ascertaining intent of voter.

Under the election laws of this state, the intent of the voter is the prime consideration in determining for whom his vote is cast; but such intent must be clearly ascertainable from the ballot itself, without indulging in speculation or strained efforts to discover such intent in any other manner than as prescribed by the statutory rules.

Same.

Where the ballot on an election for the mayor of a city contained the names of two candidates printed on lines one above the other, and also a third line, in the same order, on which was printed the words "For Mayor,"

[1] Reported in 135 N. W. 1002.

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but which contained no name, a cross-mark in the square at the end of such third line was insufficient to indicate an intention to vote for either one of the candidates named.

Erick T. Nelson appealed to the district court for Otter Tail county from the report of the canvassing board which declared that William H. McBride and Erick T. Nelson had each received 603 votes for the office of mayor of the city of Fergus Falls at the preceding election, and the vote being a tie, upon lots being cast, the lot went to McBride, who was declared duly elected. The matter was heard by Nye, J., who made findings and ordered judgment in favor of McBride. Reversed with direction to enter judgment in accordance with the opinion.

George W. Frankberg, for contestant.

G. C. Olmstead, for contestee.

PHILIP E. BROWN, J.

The parties hereto were rival candidates for the office of mayor of Fergus Falls at the city election held on April 2, 1912. The official canvassers declared the vote to be a tie, and that each of the said candidates had received 603 votes. Lots were drawn, the contestee won, and he was declared duly elected. Whereupon the contestant commenced this contest, which, after a recount of the votes and a trial to the court, resulted in findings and judgment confirming the title to the contestee to the said office; and from such judgment the contestant appealed.

There is no dispute concerning the facts. It was admitted by the parties, and the court found, that at the election 602 undisputed votes were cast for the contestant and 601 for the contestee. Besides these, there were fourteen disputed votes, designated in the record as Exhibits 2 to 15, inclusive, and it was duly stipulated and found that five of these should not be counted for either of the said candidates and that two of them should be counted for the contestant. This finding brought the contestant's total vote on undisputed ballots up to 604, with 601 for the contestee, and left for determination

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only Exhibits 2 to 7, inclusive, and Exhibit 13. The trial court did not count Exhibit 13 in favor of either party but decided that all of the six ballots, designated as Exhibits 2 to 7, inclusive, were cast in favor of the contestee, thus giving him a majority of three votes. It is apparent therefore, that if these ballots were excluded from the count leaving out of consideration Exhibit 13, the contestant will have a majority of three votes. The said six disputed ballots were all in form as follows:

		Vote for one
For Mayor—E. T. Nelson—Nominated by petition		
For Mayor—Wm. H. McBride—Nominated by petition		
For Mayor	x	

The contest turns on the correctness of the trial court's determination that these six ballots should be counted for the contestee, Wm. H. McBride.

The contestant claims, in substance, that it cannot be determined, from the position of the cross-mark on these ballots, which, if either, of the candidates the electors intended to vote for, and that consequently all of them should be excluded from the count; while the contestee, on the other hand, claims that under the liberal rules established in this state for counting marks on ballots it clearly appears from these six ballots that the voters intended to cast them for him. Both parties rely on R. L. 1905, § 275, subd. 2, and section 302 and subdivision 3 thereof.

Section 275, after providing for choice of presidential electors is as follows: "(2) In all other cases he [the voter] shall place a like mark (X) in the square opposite the printed name of each candidate for whom he desires to vote, and only those so marked shall be counted."

Section 302 is as follows: "All ballots shall be counted for the persons for whom they were intended, so far as such intent can be clearly ascertained from the ballots themselves, and, in determining

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such intent, the following rules shall be observed: * * * (3) When a mark (X) is made out of its proper place, but on or so near a name or space as to indicate clearly that the voter intended to mark such name, the vote shall be counted as so intended."

While the exact question here presented has never been decided in this state, the governing rules and the proper construction of these statutes are well established by decisions in analogous cases. Indeed, the provisions of the statute are so very clear that they scarcely need judicial construction in aid of their application, and the cases go more to the spirit in which the statutory provisions should be applied. It has been held, in substance, that our election laws should be construed so as to give every qualified elector the right to have his vote counted as cast, when and only when his intention is indicated by the markings on the official ballot, and such markings and ballots are in substantial compliance with the statute.

In other words, the intent of the voter is the important consideration; but such intent must be clearly ascertainable from the ballot itself, without indulging in speculation or strained efforts to discover such intent in any other manner than as prescribed by the statutory rules. Truelsen v. Hugo, 81 Minn. 73, 83 N. W. 500; Hughes v. Upson, 84 Minn. 85, 86 N. W. 782; Bloedel v. Cromwell, 104 Minn. 487, 116 N. W. 947. And while it is true that the legal right to vote, with all of its consequences, should not be hampered by a strict or technical construction of the laws, it is equally essential that the mandate of the majority should not be frustrated by a loose and unwarranted administration of such laws, and public policy demands that the statutes above quoted should not be emasculated by construction.

Viewing the ballots here involved in the light of such statutory provisions and the rules of construction above stated, can it, then, be said that they sufficiently indicate the intent of the voter? Or, in other words, do these ballots indicate with reasonable certainty that it was the intention of the voters to vote for the contestee? We think not. We think that such an intention, if declared, would rest in mere conjecture, and that it is impossible to determine whether the voters

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intended to vote for or against either or both of the candidates. It certainly cannot be said that the mark as placed on these ballots clearly indicates the intention of the voter to vote for the contestee, so as to bring them within the saving grace of section 302 of the statute or subdivision 3 thereof. To hold that these ballots must be counted for the contestee would in effect always give the candidate last named on the ballot an advantage, if there were two or more candidates named for the same office; for if, through ignorance, inadvertence, or an intention to vote for none of the candidates whose names are printed on the ballot, the voter should place a cross-mark opposite the blank space below the names, such mark would inure to the benefit of the last-named candidate, regardless of the cause of the mark being so placed. Indeed, a marking like the one under consideration has recently been held insufficient in a well-considered case from another state.

In State v. Acker, 142 Wis. 394, 125 N. W. 952, 20 An. Cas. 670, it was held that a ballot in practically the exact form of those we are considering and marked the same way could not be counted for anyone; the contention in favor of the ballot being aptly disposed of by Dodge, J., in delivering the opinion of the court, at page 397, as follows:

"It is argued that the electors who marked these ballots must be presumed to have intended to vote for one or the other of the two candidates, and that it is a just inference they intended to vote for the nearest name. But is there any presumption or legitimate inference that they intended to vote for either? Each voter placed his mark upon a blank line, where, if he had written another name, it would have indicated an intent to vote for such third person. Why is it not as probable that he made the mark for that purpose, and by omission or confusion failed to write the name? * * * Again, it is not beyond possibility that some or all of these electors chose this method of declaring their disapproval of both names printed upon the ballot."

The Wisconsin statute, moreover, involved in that case, is very similar to ours, and that we subscribe to the language above quoted

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has already been indicated in this opinion. Other authorities from other states likewise confirm us in our conclusion. See Flanders v. Roberts, 182 Mass. 524, 65 N. E. 902. In re Flynn, 181 Pa. St. 457, 37 Atl. 523, and the notes in the case of State v. Acker, supra, 20 An. Cas. 670.

The conclusion reached above renders it unnecessary to consider Exhibit 13, and upon such conclusion we hold that the contestant, E. T. Nelson, received a majority of the votes cast at the said election, and that he was duly elected mayor of the said city.

The judgment appealed from is reversed, with direction to enter judgment in accordance with this opinion.

HARRY L. SMITH v. ANDREW PREISS and Another.[1]

May 10, 1912.

Nos. 17,403—(32).

Broker — exclusive agency.

An "exclusive agency" to sell property is not equivalent to an "exclusive right to sell;" and where an exclusive agency only is granted, the owner retains the right to sell the property himself, without being liable to the agent for commission. Dole v. Sherwood, 41 Minn. 535, followed and applied.

Action in the district court for Stearns county to recover $2,500 commission alleged to be due in the sale of certain stock. The answer admitted that at one time defendants entered into a contract with plaintiff as broker; that pursuant to such contract plaintiff procured one Wenzler as a purchaser of the stock and that it was sold

[1] Reported in 136 N. W. 7.

[Note] The authorities on the question whether brokers's right to make sale of property is exclusive of the owner's right are collated in a note in 24 L.R.A. (N.S.) 279.

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to him, and alleged that plaintiff was fully paid for his services in such transaction and that he had never otherwise been employed by them; that the stock so sold to Wenzler was delivered back to defendants and they continued to be the owners thereof until in person they sold it to Warren Freeman, and the sale was made without plaintiff being the procuring cause of it. The case was tried before Taylor, J., who at the close of plaintiff's evidence dismissed the case. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Harry S. Locke, for appellant.

J. D. Sullivan, for respondents.

BROWN, J.

Action for commissions alleged to have been earned in procuring a purchase of certain property. The action was dismissed at the close of the trial, and plaintiff appealed from an order denying a new trial.

The facts in the case are briefly stated as follows: Defendants owned certain stock of a corporation, and gave to plaintiff the exclusive agency for the sale of the same. During the life of the agency defendants made a sale of the stock without consultation with plaintiff, and upon demand refused to pay the agent for services alleged to have been rendered in efforts to procure a purchaser. It appears that plaintiff, subsequent to his appointment as agent, made diligent effort to procure a purchaser. He advertised the stock for sale, and in many ways brought the matter to the public attention. But the evidence wholly fails to show that he was the procuring cause, or in any way instrumental, in bringing about the sale made by defendant. Nor is there any evidence tending to show that defendant, in making the sale, acted in bad faith.

An exclusive agency to sell property is not, in this state, equivalent to a grant of the "exclusive right to sell;" and where the owner grants an exclusive agency only, he retains the right in himself to sell, without being liable to the agent for a commission. Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L.R.A. 720, 16 Am. St.

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731; Baars v. Hyland, 65 Minn. 150, 67 N. W. 1148. The distinction between an exclusive agency and an exclusive right to sell is pointed out in the cases cited and requires no further comment. So that under the rule there laid down, whatever it may be in other states (Bluthenthal v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L.R.A.[N.S.] 279), defendants had the right, acting in good faith and without knowledge that the person to whom they sold was induced to buy the property by the efforts of the agent, to make the sale, notwithstanding the fact that they had clothed the agent with an exclusive agency (Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65, 8 L.R.A.[N.S.] 153, 9 An. Cas. 431; Mott v. Ferguson, 92 Minn. 201, 99 N. W. 804).

As heretofore stated, the record contains no evidence of bad faith on the part of defendants, or that plaintiff was in any way instrumental in inducing or bringing about the sale made by defendants. The court was therefore right in dismissing the action.

Order affirmed.

H. A. MILLER v. MINNIE L. BRICKER and Others.[1]

May 10, 1912.

Nos. 17,490—(46).

False representations — evidence.

In an action for damages resulting from false and fraudulent representations concerning the title to real property, it is *held* that the evidence supports the verdict, and that no reversible errors were committed upon the trial.

Action in the district court for Anoka county against Minnie L. Bricker, E. J. Bricker and Rudolph Babler to recover $4,500 damages for alleged fraudulent representations regarding the title to cer-

[1] Reported in 136 N. W. 14.

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tain lands. The answer alleged that on or about December 26, 1908, plaintiff, in order to induce defendant Minnie L. Bricker to purchase the hotel property and livery barn mentioned in the complaint, falsely represented that his interest in said property, real or personal, was worth the sum of $5,000; that the property was profitable and productive and bringing in a large income, when in fact it was not paying running expenses; that he misrepresented the amount of personal property he was selling to defendant and the amount of indebtedness standing against it; that relying upon his representations defendant was induced to enter into a contract with him to her damage in the sum of $4,500. The reply was a general denial. The case was tried before Holt, J., and a jury which returned a verdict in favor of plaintiff for $2,600. From an order denying defendant Babler's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

C. C. Joslyn and *E. W. Richter*, for appellant.

Will A. Blanchard, for respondent.

BROWN, J.

Action for damages for fraudulent representations concerning the title to certain real property, in which plaintiff had a verdict, and defendant Babler appealed from an order denying his alternative motion for judgment or a new trial.

The facts in brief are as follows: Plaintiff was in possession of certain real property in the city of Anoka, known as the "Blanchett Hotel," under an executory contract for the purchase of the same. Defendant Babler, a real estate dealer doing business in Minneapolis, held the fee title to the property, subject to plaintiff's contract of purchase. Plaintiff was in default in some of the payments required by the contract. Defendant Babler introduced to plaintiff the subject of a trade of the property for land in North Dakota, representing that he had a client who owned a half section in Dunn county, that state, subject to an indebtedness of $900, and thought that he could effect an exchange. Plaintiff requested that the client be brought in and they would talk the matter over.

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Babler subsequently presented defendant E. J. Bricker, and after some negotiations an agreement for an exchange was effected. At this interview both Babler and Bricker represented that defendant Minnie L. Bricker, wife of defendant E. J. Bricker, owned the North Dakota land. Plaintiff's equity in the hotel property was valued at $4,500, and an exchange of the land, subject to the incumbrance of $900, for the hotel, was finally agreed upon. Plaintiff, his wife joining, executed a written assignment of his contract of purchase, the name of the assignee being left in blank, in which the name of defendant Babler was inserted, within two or three hours after its execution, by authority of defendant Bricker. A written contract for the sale of the North Dakota land was then prepared, in and by the terms of which Mrs. Bricker contracted and agreed to convey the land to plaintiff, upon payment of the purchase price as therein stated, namely, $4,500, "at or before the execution of this contract," and $1,600 in deferred payments. The payment of the $4,500 was represented by the assignment of plaintiff's contract for the hotel property. Mrs. Bricker was not present at the time the negotiations were in progress, or when the contract just mentioned was prepared, and it was signed in her name by her husband, as her attorney in fact; Babler and the husband representing that she had given him such authority. By the execution of these documents the transaction was closed, the papers delivered, and possession of the hotel surrendered to defendant Babler, who placed his brother in charge of the same. Another transaction at the same time relative to the hotel fixtures, and some other articles of personal property, had no particular connection with this exchange of properties, and we pass it without further mention.

The sole consideration for plaintiff's assignment of his rights in the hotel property was the agreement to convey to him the Dakota land, and he was induced to part with it upon the representations of defendants that Mrs. Bricker owned the same. As a matter of fact Mrs. Bricker had no title, right, or interest in the land at the time, nor, so far as disclosed by the record, has she possessed any such title or interest since that time. Some time prior to this transaction

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Mrs. Bricker had a contract for the purchase of the land, but she had previously assigned it to another. Before the commencement of this action plaintiff tendered to defendants the full amount of the deferred payments provided for by the contract given him in exchange for the hotel property, and both Babler and Bricker stated to him that they were unable to perform the same, presumably because Mrs. Bricker, the vendor, had no interest in the land to convey. Thereupon plaintiff brought this action for the alleged fraud practiced upon him.

It is contended by appellant: (1) That the evidence wholly fails to establish a cause of action, and that the court below erred in denying his motion for judgment notwithstanding the verdict; and (2) that the court erred in denying the motion for a new trial for errors occurring on the trial and other grounds.

1. A careful consideration of the record leads to the conclusion that all questions presented by the pleadings were properly submitted to the jury and that the evidence fully sustains the verdict. The jury was justified in finding that the transaction, as the result of which plaintiff parted with his hotel property in consideration of the contract from Mrs. Bricker to convey to him the North Dakota land, in which she had no interest at the time, was in the interest of defendant Babler, and that the benefits resulting therefrom all accrued to him. He induced and brought about the contract of exchange by his representations that he had a client who owned the North Dakota land, and he procured that client to contract to convey the same to plaintiff, when he knew, or ought to have known, that the client had no title to convey.

We will not stop to consider just what a representation of ownership of real property implies or amounts to, whether as a matter of law it should be treated as an assertion of fee title, or of some other interest; for it is clear that one to whom such a representation is made may properly rely thereon as an assertion of at least a conveyable or assignable interest, an interest not shown in Mrs. Bricker. We therefore pass this branch of appellant's argument.

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Nor can appellant claim immunity or exemption from the effect of his representations on the ground of ignorance of the state of the title, for his representation of ownership in Mrs. Bricker was one of fact, and he was bound to know the truth before inducing plaintiff to part with his property. Riggs v. Thorpe, 67 Minn. 219, 69 N. W. 891; Haven v. Neal, 43 Minn. 315, 45 N. W. 612.

That the representation was shown to be untrue cannot well be disputed. Defendant offered no evidence whatever that Mrs. Bricker was the owner of the land, and it was sufficiently shown that she was not. At least the jury was justified, from the evidence presented, together with the statement of defendants when the balance due upon the purchase price was tendered to them, that they were unable to perform the contract, in concluding that their inability to perform was because of the fact, nothing being shown to the contrary, that Mrs. Bricker had no title or interest to convey. Much that is said in the brief of appellant upon this branch of the case has reference to the contention that some of the evidence offered for the purpose of showing the facts stated was incompetent and for various reasons inadmissible, and therefore that there was no evidence to support the verdict. We find no merit in this claim. The evidence offered was the best at hand, the land being in another state, was properly admitted, and sufficient to establish plaintiff's cause of action.

2. We have fully considered the assignments of error challenging certain rulings of the trial court and here made the basis of the contention that a new trial should be granted, and discover no sufficient reason for disapproving the order appealed from. It is probable that some of the evidence objected to, particularly that having reference to the contemporaneous transfer by plaintiff of certain articles of hotel furniture and fixtures, was irrelevant and immaterial; but it was clearly without prejudice to the substantial rights of appellant, and therefore no ground for a new trial. But we deem it unnecessary separately to consider all the alleged errors in the admission and exclusion of evidence. Many of the objections made and overruled were technical and without substance, and others were not of a character to justify a reversal.

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Some of the instruments evidencing the transaction were perhaps not executed in strict conformity with the law. But that fact in the particular case was no ground for their exclusion from the evidence. Whatever their form or manner of execution, they were the basis and means by which defendants acquired plaintiff's property, and it does not lie with them to say that, because they obtained that property in exchange for defectively executed contracts, they are not liable. The fact remains that defendants received a valid transfer of plaintiff's property, and he received nothing in return therefor. The damages awarded were within the evidence and not excessive.

Order affirmed.

HOLT, J., having tried the case below, took no part.

B. PRESLEY COMPANY v. ILLINOIS CENTRAL RAILROAD COMPANY and Another.[1]

May 10, 1912.

Nos. 17,494—(85).

Carrier — injury from freezing — burden of proof.

In this action to recover damages caused by freezing to a carload of holly while being transported over defendants' railways, it is *held:*

1. There was evidence to sustain a finding that the holly was in good condition when delivered to the initial carrier for shipment.

2. Proof of this fact, and that the holly was frozen and thereby damaged on its arrival at destination, made a prima facie case, and the burden of proof was on defendants to show that the freezing was not due to negligence on their part.

3. Defendants failed to sustain this burden.

Action in the municipal court of St. Paul against the Illinois Central Railroad Company and the Minneapolis & St. Louis Rail-

[1] Reported in 136 N. W. 11.

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road Company to recover $294.22, damages caused by the freezing of a carload of holly. The separate answers were substantially the same, and alleged that there was a special contract for the shipment of the holly which provided: "No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law." "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed thereon." The answers further alleged that the holly was in as good condition when delivered to the connecting carrier as when received for shipment.

The case was tried before Finehout, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for the amount demanded. From an order denying defendants' motion for amended findings or for a new trial, they appealed. Affirmed.

How, Butler & Mitchell and *John B. Sanborn*, for appellant Illinois Central Railroad Company.

W. H. Bremner, Eugene Bryan and *George W. Seevers*, for appellant Minneapolis & St. Louis Railroad Company.

T. P. McNamara, for respondent.

BUNN, J.

This action was to recover damages to a car of holly, owned by plaintiff and transported by defendants as common carriers from Tunstalls, Virginia, to St. Paul, in November, 1908. The case was tried before the court without a jury, and a decision rendered in plaintiff's favor in the sum of $294.22. Defendants appealed from an order refusing a new trial.

Plaintiff, at the trial, offered evidence tending to prove that the holly was in good condition when shipped, and in a frozen condition when received in St. Paul, and rested. Defendant offered no testimony, other than the evidence of one witness, that it was customary to ship holly in carload lots in box cars. It was not disputed that

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the holly was frozen and almost worthless in consequence. Defendant's contention that there was no proof that the holly was in good condition when shipped is not sustained by the record.

It is therefore clear that plaintiff made a prima facie case of negligence, and that the burden was on defendants to overcome the presumption. It is defendants' contention that the presumption of negligence was overcome when it was proved that defendants accepted the car as loaded by plaintiff and transported it without delay to destination, in view of the fact that it was customary to ship holly in box cars. It is well settled in this state that the rule as to what constitutes a prima facie case applies to perishable freight. The carrier is not an insurer, but he has the burden of proof. Unless we are prepared to hold that damage by frost while in transit is something that the carrier owes no duty to attempt to prevent, we can hardly sustain the contention that the evidence shows that defendants used due care. It is not necessary to point out what defendants could have done to save the loss of the holly. They offered no evidence of any effort in that direction. We think there was an entire failure to rebut the presumption of negligence that arose.

The statement in White v. Minneapolis & P. R. Ry. Co. 111 Minn. 167, 126 N. W. 533, to the effect that, if the carload of vegetables had been promptly transported, there would be difficulty in sustaining the verdict, even though the vegetables were frozen in transit was obiter and had reference only to the peculiar facts in that case.

Order affirmed.

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EMILIE ANDERSON v. WILLIAM G. WHITE.[1]

May 10, 1912.

Nos. 17,533—(42).

Findings sustain the judgment.

Action for the purchase price of lots, which the plaintiff sold and agreed to convey to the defendant, who agreed to pay the price on tender of deed. Defense, that the defendant was induced to enter into the contract by the misrepresentation of the plaintiff as to the location of the lots. *Held*, that the findings of fact in favor of the plaintiff are sustained by the evidence, and that they justify judgment for plaintiff, and, further, that the trial court did not err in its rulings as to the admission of evidence.

Action in the district court for Hennepin county to recover $575 upon a contract for the purchase of certain lots. The case was tried before Steele, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

J. H. Green and *J. M. Pulliam*, for appellant.

McIntyre & Hursh, for respondent.

START, C. J.

On June 18, 1910, the plaintiff was the owner of six lots in Ottoville, on Lake Minnetonka, and on that day the parties hereto entered into a written contract whereby the plaintiff sold and agreed to convey the lots to the defendant, who agreed to pay the plaintiff therefor $600, payable $25 on the execution of the contract and $575 August 18, 1910, or as soon thereafter as a warranty deed conveying good title should be tendered. This action was brought in the district court of the county of Hennepin to recover the balance due on the contract, $575.

The complaint alleged the execution of the contract, performance

[1] Reported in 135 N. W. 1006.

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thereof on the part of the plaintiff, including the tender of a warranty deed for the lots to the defendant, and a demand for the balance of the purchase price. The answer admitted the execution of the contract, and performance on the part of the plaintiff, and alleged in effect that defendant was induced to enter into the contract by the fraud or inexcusable mistake of plaintiff in showing him certain lots other than those described in the contract, and represented to him that they were the lots she proposed to sell to him, and that the lots described in the contract were the same lots plaintiff had shown to him; that the representation was untrue, in that the lots shown plaintiff were worth $700, but those described in the contract were of no value whatever; and that, upon discovering the fraud or mistake, the defendant notified the plaintiff and demanded that the contract be corrected so as to describe the lots shown to him. The reply put in issue the new matter alleged in the answer.

The cause was tried by the court without a jury, findings of fact made in favor of the plaintiff, and judgment directed for the amount claimed in the complaint. Judgment was so entered, and the defendant appealed therefrom.

The assignments of error raise two general questions: Whether the findings of fact are sustained by the evidence, and whether the facts found sustain the judgment; also, whether there was reversible error in the rulings of the court as to the admission of evidence. The facts found by the trial court were substantially those alleged in the complaint. There was no finding relevant to the issue of fraud tendered by the answer, nor any request for a finding on such issue. Nor does the record disclose any evidence which would sustain a finding of any fraud or misrepresentation by the plaintiff. The defendant does not here seriously claim that there was any fraudulent misrepresentation on the part of the plaintiff, but that there was a material mistake of the parties as to the subject-matter of the contract, that is, as to the identity and location of the lots, or at least that he was mistaken in this respect, which was induced by the innocent misrepresentation and mistake of the plaintiff or her alleged agent. The objection that no such issue was made by the pleadings

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aside, it is clear that the evidence would not justify, much less require, a finding that such misrepresentation, innocent or otherwise, was made by the plaintiff, or by anyone authorized to speak or act for her. The evidence sustains the findings of fact, which justify the conclusion of law.

We have considered the several rulings of the trial court as to the admission of evidence, and find no reversible error therein.

Judgment affirmed.

STATE v. JOHN ROTH.[1]

May 10, 1912.

Nos. 17,535—(2).

Demurrer to indictment during course of trial.

Defendant was convicted of arson in the third degree. It is *held* it was not error to refuse to permit defendant to demur to the indictment after the trial had begun; it appearing that the only ground for demurring was that the indictment failed to state facts sufficient to constitute the crime.

Indictment sufficient.

An indictment for arson in the third degree is not bad because it fails to state that the burning was "under circumstances not amounting to arson in the first or second degree," nor because the acts charged might also constitute a crime under R. L. 1905, § 5126.

Evidence — corroboration.

The verdict of guilty is sustained by the evidence, there was sufficient corroboration of the testimony of an alleged accomplice, and there were no prejudicial errors in the rulings on the trial.

Defendant was indicted by the grand jury of Nicollet county of the crime of arson in the third degree. He was tried in the dis-

[1] Reported in 136 N. W. 12.

[Note] Arson by one spouse burning property of the other, see note in 21 L.R.A.(N.S.) 27.

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trict court for that county before Olsen, J., and a jury which returned a verdict of "guilty." From an order refusing to vacate the judgment sentencing him for one year and six months at hard labor in the state prison, defendant appealed. Affirmed.

C. H. Biorn, for appellant.

Lyndon A. Smith, Attorney General, *Alonzo J. Edgerton,* Assistant Attorney General, and *George T. Olsen,* County Attorney, for the state.

BUNN, J.

Defendant was convicted of arson in the third degree, and sentenced to the state prison for one year and six months. This appeal is from an order denying his motion for a new trial.

1. The first assignment of error challenges the refusal of the trial court to permit a demurrer to the indictment after the trial had begun. It is clear, from the indictment itself, that the only ground for demurrer was that it failed to state facts sufficient to constitute the crime of arson in the third degree. As defendant could make this objection at any time, the ruling of the court was without prejudice.

2. We find no error in permitting the county attorney to comment on certain occurrences after the fire, or in receiving evidence in relation thereto.

3. The first question of importance is as to the sufficiency of the indictment. It was in the following language: "John Roth is accused by the grand jury of the county of Nicollet, by this indictment, of the crime of arson in the third degree, committed as follows: The said John Roth, on the 29th day of March, 1911, at Klossner station, in the town of Lafayette, in this county, did then and there wilfully, unlawfully, and feloniously burn a certain two-story frame store building standing and being on lot number one (1) of block number three (3) in Klossner station, in the town of Lafayette, Nicollet county, Minnesota, according to the plat of said Klossner station, filed and of record in the office of the register of deeds in and for said county, the said building being then and there

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the property of one Katie Roth and one John Roth, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota." It is apparent that it was intended to charge a crime under R. L. 1905, § 5038, subd. 2, which provides that "every person who shall wilfully burn or set on fire * * * building, * * * under circumstances which would not amount to arson in the first or second degree," shall be guilty of arson in the third degree. It is argued that the indictment was fatally defective, in that it failed to state that the burning was "under circumstances which would not amount to arson in the first or second degree." We hold that it was not necessary to make this statement.

The failure to state in the indictment that the burning was in the nighttime, or that there was a human being in the building, told the defendant explicitly that he was not charged with either first or second degree arson. He was informed of the acts which the state claimed constituted the crime with which he was charged in plain words, and there was no opportunity for misunderstanding. To inform defendant that the crime was committed under circumstances that did not amount to arson in a higher degree could add nothing to his knowledge gained from the omission to charge the facts which would have made the crime arson in the first or second degree.

We do not sustain the claim that defendant would have a right to assume that he was indicted under R. L. § 5126, providing that one who wilfully burns a building "under circumstances not amounting to arson in any degree" shall be punished by imprisonment in a county jail for not more than one year. It is not easy to understand how there can be a wilful burning of a building under circumstances not amounting to arson in any degree; but, assuming that the same facts pleaded in this indictment might constitute a crime under section 5126, it is still clear that they constituted arson in the third degree, and defendant would have no right to assume that he was charged with the lesser crime, especially as the indictment expressly charges him with the crime of arson in the third degree.

It was not necessary to describe the building with any more particularity than was done in the indictment, and we hold that the

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crime of arson in the third degree was sufficiently charged, and that the indictment was good.

4. It is claimed that the evidence was not sufficient to sustain the verdict, and that there were errors in the rulings on the trial. A short statement of the facts follows: The building that was burned was on March 16, 1911, and prior thereto, the property of defendant's wife and himself. It was insured for $2,000. In December, 1909, Noble P. Gruer, a boy of seventeen, was employed by defendant and worked for him until March. Gruer testified that during this winter defendant offered to give him $200 if he would burn the store building at Klossner. Gruer again worked for defendant during the winter of 1910–1911, and testified that defendant talked with him several times in an effort to induce him to burn the building, and finally proposed to give Gruer a contract for a deed to the property, by which the latter was to bind himself to pay $1,500 for the property one year from date, with the understanding that Gruer should burn the building, collect the insurance, pay the $1,500 to defendant, and retain for himself the balance of the insurance and the land. Gruer testified that defendant instructed him how to set the fire. The contract was executed by defendant's wife and himself March 16, 1911. It gave the purchase price as $2,000, and recited that $500 of this had been paid, the balance to be paid in one year. The insurance policy was assigned to Gruer, and he also executed a note for the $1,500. He testified that he went to Klossner, and after staying there a few days burned the building March 29, 1911. In corroboration of Gruer's evidence, the contract, insurance policy, and note were received, and there were also letters written by defendant to Gruer after the fire, showing a suspicious interest in Gruer's persuading the insurance company that the fire was accidental, and in having the insurance promptly settled. Gruer had testified that the $500 recited in the contract had not been paid, and was not intended to be. This was corroborated by the evidence of the cashier of the bank at Finlayson, who prepared and took the acknowledgment of the contract, and attended to the transfer of the insurance policy.

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Several witnesses testified to the presence of Gruer in Klossner before and after the fire, and as to his actions.

Defendant testified on his own behalf, and denied having anything to do with inducing Gruer to burn the building. His claim, supported by the evidence of himself and his two sons, was that Gruer claimed to have some $1,700 saved, and bought the Klossner property for $1,500, with the intention of starting in business there. Putting the consideration at $2,000 was claimed to be at the suggestion of Gruer. In short, defendant's case was that there was an actual, bona fide sale to Gruer. Witnesses testified to the good reputation of defendant.

We hold that the evidence was sufficient to justify a verdict of guilty. We are of the opinion that, if Gruer was an accomplice, his evidence was sufficiently corroborated on all essential points.

The point is made that it was not arson for defendant to burn his wife's property. In view of our statutes in reference to the property of a married woman, it cannot be held that it was not the property of another than defendant. The point that the property belonged to Gruer has no merit. If the state's theory was correct, there had been no sale to Gruer.

It is urged that it was error to admit evidence relating to the insurance, because the indictment was not for burning with intent to prejudice the insurer. But the evidence was clearly admissible to show motive. Nor is it material that the policy may have been invalid. Defendant apparently considered it valid, and it was relevant evidence, though it may have been in fact void.

We have considered all of the numerous points made by defendant's counsel, and hold that there was no prejudicial error in any of the rulings complained of. The question of defendant's guilt was, on the evidence, one for the jury, and the verdict cannot be disturbed.

Order affirmed.

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FRANK A. BEMIS and Another v. NORTHWESTERN TRUST CO.[1]

May 10, 1912.

Nos. 17,556—(173).

Will — valid and invalid provisions.

If a will contains distinct and independent provisions, some of which are valid and others invalid, effect must be given to the valid ones, and there is an intestacy only as to that part of his estate affected by the invalid ones; but when the several provisions of the will are so dependent upon and connected with each other that they cannot be separated, without defeating the general intent of the testator, they are all void, and there is a total intestacy.

Construction of will.

The testator herein gave three funds to the appellant herein, in trust to pay the annual income therefrom to each of his three sons during his life, and at his death to pay two-thirds of the fund held for his benefit to the trustees of a home for aged men and women, which the testator attempted by his will to found and endow; but the provisions as to the proposed home are invalid. *Held*, that the provisions for the benefit of the sons were not so connected with and dependent upon those for the home that they must also fail.

Frank A. Bemis and Willie E. Bemis petitioned the probate court for Fillmore county to compel the executor of the estate of Levi Bemis, deceased, to file his account; that if correct such account be settled by the court; that a partial distribution be made in the sum of $10,000, or in such sum as the court should deem proper, to the heirs-at-law of decedent to the exclusion of the devisees and legatees mentioned in the will; and that the heirs-at-law and all persons interested be cited into court to show cause why the petition should not be answered. The executor, the persons named as trustees in the ninth paragraph of the will, and the Levi Bemis Home for the Aged,

[1] Reported in 135 N. W. 1124.

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a corporation, separately answered. Jennie Bemis, the widow, and the petitioners demurred to the answer of the executor and to those of the trustees and of the corporation. The case was heard before the probate court, who found that the trust described in the eighth paragraph of the will was void, as were the trusts described in the fourth, fifth and sixth paragraphs, and ordered a partial distribution of the estate to the widow and sons of the testator. From the order, appeals were taken to the district court for Fillmore county. The appeals were heard by Kingsley, J., who in all things affirmed the order of the probate court. From the order affirming the order of the probate court, the Northwestern Trust Company appealed. Modified in part.

John D. O'Brien and *Dillon J. O'Brien,* for appellant.

Brown, Abbott & Somsen, Gray & Thompson, John W. Hopp, E. W. Rossman, and *Joseph Underleak,* for respondents.

START, C. J.

This is an appeal by the Northwestern Trust Company from the judgment of the district court of the county of Fillmore, affirming a partial decree of distribution of the estate of Levi Bemis, of Chatfield, Minnesota, who died leaving a last will, and involves the question of the validity of certain bequests made by him. The testator left an estate of the approximate value of $300,000, and his widow and four sons are his sole heirs at law. His purpose in making his will, as indicated by its provisions, was to provide for his widow and sons, and to devote the residue of his estate, except $5,000 given to the Chatfield Cemetery Association, to the establishment in Chatfield of a home for aged men and women, to be known and called the "Levi Bemis Home." The here material provisions of the will, as modified by a codicil, are to the effect following:

The second clause thereof gave to his widow $30,000 in lieu of all statutory provisions and allowances.

The third clause gave absolutely to his son Victor E. Bemis $30,000.

The fourth clause gave to the appellant, the Northwestern Trust

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Company, $25,000 in trust for the purpose of investing the same and paying the net annual income from the trust fund to his son Harry L. Bemis during his natural life, and at his death to pay two-thirds of the principal to the Levi Bemis Home, a charitable institution provided for in the eighth clause of the will, and to pay the other one-third thereof to such of the testator's grandchildren of the body of his children as may be living at the time of the death of his son Harry, share and share alike.

The fifth clause gave to the Northwestern Trust Company $30,000 in trust to pay the net annual income thereof to his son Frank A. Bemis during his natural life, and at his death to pay two-thirds of the principal to the Levi Bemis Home, and one-third thereof to such of the testator's "grandchildren of the body of my children as may be living at the time of the death of my said son Frank A. Bemis," share and share alike.

The sixth clause gave to the Northwestern Trust Company $30,000 in trust to pay the net annual income thereof to his son Willie E. Bemis during his natural life, and at his death to pay two-thirds of the principal to the Levi Bemis Home, and one-third thereof to such of the testator's grandchildren of the body of his children "as may be living at the time of the death of my said son Willie E. Bemis, share and share alike."

The eighth clause, as far as here material, was to the effect following: It gave to five persons, as trustees, naming them, $75,000 in trust for the uses and purposes of obtaining, establishing, building, maintaining, endowing, and carrying on in the city of Chatfield a home for aged men and women, to be known as, and called, "The Levi Bemis Home for the Aged;" $25,000 thereof to be known as the building fund, to be used by the trustees and their successors for the purchase of grounds and the erection of suitable buildings thereon for the home, to be known as the "building fund," the balance of the bequest to be known as the "endowment fund," which is to be a permanent and perpetual fund, to be invested and reinvested by the trustees, and their successors in said trust, and the income thereof is to be used in keeping in repair the buildings and grounds of the

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home, and in maintaining the home and the inmates thereof. If for any reason any of the trustees of the home and funds may be unable to act as such, or a vacancy shall occur in the board of trustees, then and in such case the vacancy may be filled by the remaining trustees, if able to agree, but, if not, then by the judge of the district court of the county of Fillmore. Whenever it is deemed best for the board of trustees that a corporation be formed under the laws of the state of Minnesota to administer and execute this trust, then he desired that such corporation should be organized, if the same could be legally done, and in that event that the trustees be officers and directors thereof until their successors are elected. Upon the organization of such corporation, then such trustees are authorized and empowered to convey to such corporation all property acquired by them by reason of this trust, and to turn over to such corporation all money and property in their hands as such trustees, and turn over to such corporation the management of the home.

The ninth clause gave all the residue of the estate to the trustees named in the eighth clause of the will, in trust for the uses and purposes of establishing, maintaining, and endowing the Levi Bemis Home for the Aged provided for in the eighth clause of the will.

The trustees organized a corporation, the Levi Bemis Home for the Aged. The widow of the testator duly filed her declination to take under the will, and elected to claim the share of his estate provided by the statute. Her right to one-third of the estate is not here questioned by any party to the appeal. The probate court held that the trust attempted to be created by the eighth clause in the will was void, because the intended beneficiary of the trust was uncertain and incapable of being made certain; that the execution of the trust is not limited to the time fixed by statute, and that it suspends the power of alienation beyond the statutory limit, and as a legal inference therefrom that the fourth, fifth, and sixth clauses of the will were void, because no residuary legatee or devisee capable of accepting the same was named; and, further, that by reason of such illegal trusts and the declination of the widow to accept the provisions made for her by the will the general scheme and purpose of the testa-

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tor in making disposition of his property by his will has been destroyed. The probate court made its decree on the basis that all of the bequests made in the will, except the one to the cemetery association, which was not contested, were void, and gave one-third of the estate to the widow, and the balance to the sons, including Victor, in equal shares.

The trust company and the Levi Bemis Home severally appealed from the decree to the district court, which affirmed, by its judgment, the decree in its entirety. Only the trust company appealed to this court.

It appears from the memorandum of the trial court that it held the fourth, fifth, and sixth clauses of the will void for the reason that: "The gift in the eighth subdivision of the will must be held void. This defeats the scheme of the testator as to the bulk of his estate, and as courts are not empowered to make wills, but to construe them, the remaining provisions of the will, excepting the seventh paragraph thereof, which was not attacked, must be held void. * * *"

Although the trust company is the only appellant, yet the question of the validity of the eighth clause is here material, in so far as the validity of the other contested clauses of the will depend upon it, if at all. It is clear that the eighth clause is void, for the reason that the beneficiaries of the trust are uncertain and incapable of being made certain. It violates the statute against perpetuities, and suspends the absolute power of alienation of the real estate for a longer period than the continuance of two lives in being at the creation of the trust. R. L. 1905, §§ 3204–3249; Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948; Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104; Rong v. Haller, 109 Minn. 191, 123 N. W. 471, 806, 26 L.R.A.(N.S.) 825.

It is urged by appellant that the trustees are authorized by the will to form a corporation to execute the trust whenever they deem it best to do so; but the time when the corporation shall be formed is left to the unlimited discretion of a self-perpetuating board of trustees. This distinguishes this case from Watkins v. Bigelow, supra, relied

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on by the appellant, in which the will expressly directed that, during the life of the two youngest executors named therein, the executors should organize a corporation under the laws of this state to own and administer the fund for the benefit of the worthy poor of St. Paul, to which corporation the will gave the fund as absolute owner, to have and to hold to it and to its successors forever.

The serious question, however, is whether the failure of the testator to give, by the terms of his will, legal effect to his intention and scheme of forming and endowing a home for aged men and women renders void the provisions of the will as to his several sons. The general rules of law applicable to this question are well settled, but the difficulty lies in their application to particular cases. If a will contains distinct and independent provisions, some of which are valid and others invalid, effect must be given to the valid ones, and there is an intestacy only as to that part of the testator's estate which is affected by the invalid ones; but when the several provisions of the will are so dependent upon and connected with each other that they cannot be separated without defeating the general intent of the testator, they are all void, and there is a total intestacy. Sabledowsky v. Arbuckle, 50 Minn. 475, 52 N. W. 920; Rong v. Haller, 109 Minn. 191, 123 N. W. 471, 806, 26 L.R.A.(N.S.) 825.

The pivotal question, then, is whether the provisions of the fourth, fifth, and sixth clauses of the will are so dependent upon and connected with the scheme of the testator for founding and endowing a home for aged men and women, as provided in the eighth clause of the will, that they cannot be separated without defeating the general intent of the testator. It is clear from a reading of the will that the provisions thereof, as to the testator's three sons, are in no manner dependent upon the scheme for the founding of the home. The trusts created for the sons are valid, and may be executed without reference to the validity or invalidity of the scheme for the home. The only connection between such trusts and the home scheme is that, when they are fully administered as to each of the sons and upon the death of each, two-thirds of the fund held for him is to be paid to the home. The home scheme fails, not by reason of its connection with or de-

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pendence on the provisions made for the sons, but because the trust attempted to be created for the home was an invalid one. The trusts for the sons are no more dependent upon the home scheme than is the absolute gift to the son Victor.

It is urged that to sustain the trusts for the benefit of the sons, the home scheme having failed, would be to make a will by the court, and not by the testator. We fail to find any provisions in the will tending to justify this claim. On the contrary, a consideration of all of them satisfies us that a failure to sustain such trusts would be making pro tanto a new will for the testator, in that the result would be to give to each of the sons the absolute title to the trust fund, intended for his benefit, instead of the income thereof for life.

There is nothing in any part of the will to indicate a purpose on the part of the testator to give his sons the income of the respective funds, so that the endowment of the home might be increased upon the termination of the several trusts. The fair inference from the provisions of the will is to the contrary, and that the gift of a part of the trust fund, after the death of his sons, to the home, was a mere incident to the testator's purpose of providing them with an income for life. If such were not the case, and his purpose was to increase the endowment fund, why was the legacy to his son Victor made an absolute one? It fairly appears upon the face of the will that the primary and independent purpose of the testator was to make such provisions for his sons in such form as he deemed equitable and proper, in view of their respective ability or inclination of each to manage with frugality his bounty. This case falls within the rule that invalid provisions of a will do not defeat legal ones that are not dependent upon them.

We accordingly hold that the third, fourth, fifth, and sixth clauses of the will are valid, and must be given effect, except as to the direction for the payment to the home of two-thirds of the trust fund held for each son upon his death; that as to such reversionary interest in two-thirds of each fund, and as to the portion of the testator's estate attempted to be given to the trustees of the home, the testator died intestate; and that the direction to the trustees to pay one-third

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of the trust fund held for each son upon his death to the testator's grandchildren, as designated in the will, is valid, because it refers to a definite class, and all belonging to the class when the right to the one-third accrues are entitled to share equally therein. Yates v. Shern, 84 Minn. 161, 86 N. W. 1004.

It follows that the judgment appealed from must be modified in the respects we have indicated, and affirmed in all other particulars, and the case remanded, with direction to the district court so to modify its judgment. So ordered.

ALEXANDER MONTGOMERY v. ELIZABETH GRENIER and Another.[1]

May 10, 1912.

Nos. 17,563—(65).

Will — family settlement.

An agreement on the part of a brother of a deceased person with another brother and sister to refrain from contesting the will of decedent in consideration of the promise of the latter, beneficiaries named in the will, to pay to him a certain sum of money, is not, on the facts stated in the opinion, a "family settlement," within the meaning of the law upon that subject.

Consideration of promissory notes.

There was no basis, legal or otherwise, for the proposed contest, nor did the facts furnish reasonable cause for the belief that grounds therefor existed, and plaintiff's threat of contest was not made in good faith. *Held*, that the agreement to refrain from contesting the will was not a legal or valid consideration for the promissory notes given by defendants in consideration of the agreement.

Two actions in the district court for Ramsey county to recover a balance upon promissory notes. The answer admitted the execution

[1] Reported in 136 N. W. 9.

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of a promissory note, but alleged that the note was without consideration. By consent the cases were tried together before Brill, J. At the close of the testimony defendants' motion to dismiss the cases was granted. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed

Orr, Stark & Collett, for appellant.

Charles W. Farnham, Newgren & Bjorklund and *O'Brien, Young & Stone,* for respondent.

BROWN, J.

Separate actions were brought by plaintiff, one against W. J. Montgomery and one against Elizabeth Grenier, to recover upon certain promissory notes made and delivered by defendants to plaintiff, and as both actions involved the same transaction, they were consolidated in the court below and tried together. At the conclusion of the trial the actions were dismissed, and plaintiff appealed from an order denying a new trial.

The facts are as follows: Hugh Montgomery, for many years theretofore a resident of St. Paul, died in that city on July 6, 1907, leaving a last will and testament, in and by which he devised and bequeathed all and singular his property to various persons, the principal part thereof going to defendants in these actions, his brother and sister. Decedent left no widow or children. Plaintiff is also a brother of decedent, and came on from his home in New York state to attend the funeral, and thereafter visited with defendants for a week or ten days. Within a short time after the funeral of decedent the matter of his estate came up and was the subject of some conversation between plaintiff and defendant W. J. Montgomery. Plaintiff was informed of the will, and that the bulk of the estate was given to defendants. He claims also to have been informed, the truth of which must be conceded, that decedent had stated to one of defendants that he intended to change his will and leave a part of the property to plaintiff, and that his sudden death had prevented the change. Plaintiff thought that he was, as a brother, as much entitled to share in the estate as defendants, brother and sister, and he inti-

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mated an intention to contest the will. It is also claimed, and this, too, must be taken as a fact, that to avoid the threatened contest defendants each agreed to pay to plaintiff the sum of $1,000, from the share of the estate passing to them. In consummation of the agreement they made and delivered to plaintiff the promissory notes here in suit. Each defendant interposed in defense that the notes were wholly without consideration. This was, by the dismissal of the actions, sustained by the trial court. The only question presented is whether the court below was in error in that conclusion.

It is contended by plaintiff that a sufficient consideration was shown and that the promissory notes are valid obligations: (1) Because they were made and delivered as a result of the settlement of family difficulties; (2) that the settlement should not be overturned, for the reason that plaintiff cannot be placed in statu quo; (3) that plaintiff lost the right of contest, a valuable right, therefore a consideration; and (4) that plaintiff had the bona fide intention of contesting the will, and had good grounds therefor, and that his good faith in the matter should have been submitted to the jury. We are unable to sustain any of these contentions.

1. The rules applied in upholding family settlements are inapplicable to this controversy. 12 Am. & Eng. Enc. (2d ed.) 875. No family difficulty was shown, within that branch of the law. The most amicable relations appear to have existed between the parties, and the sole basis for the settlement, as we view the evidence, was the feeling of plaintiff that some provision should have been made for him by the will. Plaintiff was, as a matter of law, not entitled to any share in the estate, and the evidence presents no suggestion that he possessed a valid, or even doubtful, claim to any part of it.

The doctrine of "family settlements" is predicated upon the family relation, and upon the fact that mutual rights and good faith controversies are, in the interests of family harmony, best settled and adjusted at the home, rather than in the courts, and for that reason are sustained, where no fraud or mistake is shown. In the case at bar no family relations, within the meaning of the law, existed between these parties. They were all of mature years, and each

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maintained a home of his own. Plaintiff resided in the state of New York, and defendants in this state. Plaintiff had met his deceased brother or defendants but once in forty years, and there had been no frequent correspondence between them. We have been cited to no case where the doctrine invoked has been held to apply to a situation of this kind. The mere fact that the parties are related, that relation being brother and sister, does not necessarily make them members of a "family," within the meaning of the law of family settlements.

2. The other contentions may be disposed of under one inquiry, namely, whether plaintiff's agreement to refrain from contesting the will furnished a valid and sufficient consideration for the notes in suit.

The decisions upon the question are by no means harmonious. It is held by some courts that the promise to refrain from instituting legal proceedings to enforce an asserted demand or claim against another constitutes a legal and valid consideration for the promise of the latter to pay the demand or perform the thing demanded, without regard to its validity or the good faith of the person asserting it. See note to Armijo v. Henry (N. M.) 25 L.R.A.(N.S.) at p. 299. But such is not the law in this state. It was held in Neibles v. Minneapolis & St. Louis Ry. Co. 37 Minn. 151, 33 N. W. 332, that to sustain a compromise and settlement it must appear that the claim or controversy settled, though perhaps not in fact valid in law, was presented and demanded in good faith and upon reasonable grounds for inducing the belief that it was enforceable. And the rule thus stated is the prevailing one in this country. It has been applied in numerous cases involving the settlement of the estate of deceased persons; the courts holding that a claim presented against the estate, a promise to refrain from attempting by legal proceedings to enforce which forms the basis for a settlement, must have some plausible or reasonable ground for its support—facts sufficient to justify a good faith belief in the merits of the claim or demand. Crawford v. Engram, 157 Ala. 314, 47 South. 712; Prater v. Miller, 25 Ala. 320, 60 Am. Dec. 521; Bellows v. Sowles,

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55 Vt. 391, 45 Am. Rep. 621; Busby v. Conoway, 8 Md. 55, 63 Am. Dec. 688; House v. Callicott, 83 Miss. 506, 35 South. 761; Taylor v. Weeks, 129 Mich. 233, 236, 88 N. W. 466. The rule in point of substance was applied in Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L.R.A.(N.S.) 1141, 123 Am. St. 320, 14 Ann. Cas. 54.

A careful examination of the record in the case at bar leads to the conclusion that the learned trial court correctly disposed of the case. It is beyond controversy that plaintiff had no valid claim to any part of the estate in question, and the court was fully justified, from the evidence produced, in finding that plaintiff did not make his claim or threaten to contest the will in good faith. The evidence wholly fails to show that there existed any ground, reasonable or otherwise, for a contest of the will. Plaintiff had not examined the will. He did not know its terms or provisions, further than informed by defendant W. J. Montgomery. It was properly executed, and there is no intimation that the testator was not of sound and disposing mind. With no basis in fact for a contest, and no reasonable ground for believing that a contest might rightfully be instituted and maintained, the agreement to refrain from so doing furnishes, within the rule of our decisions, no sufficient consideration for the promise of defendants to give him a part of their legacy. The facts clearly distinguish the case from Thayer v. Estate of Pray, 111 Minn. 451, 127 N. W. 392, and Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591. The other authorities cited by plaintiff to sustain his contention are not in accord with the rule in this state, and, of course, are not to be followed.

Order affirmed.

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SOUTHERN MINNESOTA INVESTMENT & LOAN COMPANY v. BRITANNIA J. LIVINGSTON and Others.[1]

May 10, 1912.

Nos. 17,566—(48).

Vacating default — review of trial court's discretion.

Where an application to open a default is denied by the trial court, such action will not be disturbed on appeal, unless the record discloses an abuse of discretion in passing upon, not only the excuse for the default, but also upon the good faith and merit in the claim sought to be asserted by the applicant.

Same.

The record examined, and held not to show reversible error.

Appeal by Southern Minnesota Investment & Loan Co. from the judgment of the district court for Martin county, entered pursuant to the order of Quinn, J., affirming an order of the probate court of that county, Goetz, J., and denying appellant's application to open a default and permit it to file objections to the last will and testament of William R. Livingston, deceased. Affirmed.

Dunn & Carlson and *De Forrest Ward,* for appellant.

Dean & Palmer, for respondent.

HOLT, J.

The appeal is from a judgment of the district court, affirming an order of the probate court, denying the appellant's application to open a default and permit it to file objections to the probate of the last will and testament of William R. Livingston, deceased, and contest the allowance thereof.

On December 9, 1909, William R. Livingston, for many years a resident of Martin county, Minnesota, died supposedly intestate, and on that assumption proceedings were instituted in the probate

[1] Reported in 136 N. W. 8.

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court to administrate the estate; but before distribution a will, dated November 1, 1899, was found. A son, one of the legatees, at once petitioned the probate court of the county for the allowance and probate of the will, and due notice for the hearing thereon was given for December 31, 1910, at ten o'clock a. m. The will gave the widow nothing in addition to the provision made by statute, What remained after she had received her share went to five children in equal shares. One child, Roy R. Livingston, received nothing; the will stating: "Roy R. Livingston having already received more than twice as much from me as any of the aforesaid children will from my estate, I hereby declare it to be my intention to make no provision for him herein."

On December 7, 1910, the appellant, the Southern Minnesota Investment & Loan Company, obtained a judgment against Roy R. Livingston for $4,752.84 in the district court of Crow Wing county, Minnesota, and on the tenth of the same month a transcript thereof was duly docketed in said Martin county, where was the real estate of the deceased. The judgment is unpaid, and Roy R. Livingston insolvent.

On December 20, 1910, appellant's attorney examined the will in the probate court, and on December 30, informed the judge thereof that as such attorney he would file objections to the probate of the same and contest its allowance. He claims that because of lack of a stenographer he was unable to get his objections in proper shape for filing in time, and that at 9:45 of December 31 he requested the probate judge, by telephone, to permit the objections to be filed as of that moment, but let the attorney retain them a few minutes to look over and make some corrections therein; the judge replying that would be all right. The probate judge substantially admits the telephone communication, but says the attorney asked him if Vick Livingston (the proponent of the will) was in probate court, that he wished to see him, and, further, he said:

" 'You know that I am going to file an objection to the proving of the will of William R. Livingston, but as I have no stenographer, and had to write it out, but have it already for filing, as now, or filing

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now' (which I did not fully understand); 'but,' he said 'I only want to read it over and bring it up in a few minutes.' And I said, 'All right.'" The attorney presented the objections to the court for filing at ten minutes after the time set. When so presented, the proponent, his attorney, and the only surviving witness to the execution of the will were still in the probate court and the formal proof of the will was not signed by the witness. The attorney for proponent objected to the proposed objection of appellant as not being filed in time, and although it appears that tentatively a day was set for the continued hearing of the probate of the will, the court subsequently sustained proponent's objection. Thereupon the motion now under review to open the default was made and denied.

The order appealed from being a discretionary order, this court may only determine whether the record shows the ruling to be an abuse of discretion. Technically the appellant did not comply with the statute, which gives a person the right to contest the probate of a will only upon condition that written objections are filed in court "before the time appointed for proving the will," and therefore it was in default. The reason given by the attorney for not being able to have the simple and short objections he had to the will ready for filing within the appointed time may well be held to have been a makeshift. The court, however, had the right to open the default if any merit appeared in the proposed contest, and, if appellant had presented a meritorious contest, a denial to set aside a default taken under the circumstances of this case would, without doubt, be an abuse of discretion. Courts ought to be ever ready to give a claim asserted in good faith a hearing on the merits, and to that end the excusable neglect of an attorney should not be given too strict or narrow a meaning, thereby depriving the client of his day in court.

But where a default has been declared, and the court is asked to remove it, the prevailing practice is to require a party to show merit in the claim asserted or defense interposed. The will sought to be contested was made many years before. On its face it is clear and lucid. The reason therein stated for excluding the son, Roy R. Livingston, if true, is just and equitable. Appellant does not

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deny that the will was duly executed by William R. Livingston. The assertion is simply that the testator was not of sound mind, had at times been confined in an insane asylum, and entertained insane delusions as to the son Roy. The only evidence to support these contentions is the affidavit of the attorney for appellant, with no showing that this son had not, as stated in the will, received more than twice what any other child would get. Not only the evidence of sanity in the will itself, but the testimony of the attesting witness that the testator was of sound and disposing mind when the will was made, was before the court. Both the probate and district judge undoubtedly know the attorneys practising in their courts, and are in a better position to estimate the true worth of their affidavits than we are. That no abuse of discretion in the refusal to set aside the default is made to appear is the conclusion of all the members of the court, except the writer, who is of the opinion that, on the statement of the probate judge as to what occurred between him and appellant's attorney, the ruling declaring a default was so arbitrary and indefensible that it should be set aside without hesitancy upon the application made.

The judgment is affirmed.

THEODORE SANDER v. GEORGE W. STENGER.[1]

May 10, 1912.

Nos. 17,569—(189).

Registration subject to mortgage — foreclosure.

In this action to set aside the foreclosure of a mortgage by advertisement, it is *held:*

1. When land is registered under the Torrens law, subject to the lien of a mortgage, it is not necessary to the foreclosure of such mortgage by

[1] Reported in 136 N. W. 4.

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advertisement that assignments of the same made before the decree of registration should be registered, or a memorial thereof be entered upon the certificate of title. Section 55, c. 305, Laws 1905, applies only to mortgages and assignments made after the decree.

2. On the facts in this case, the owner of the mortgage had the right to foreclosure by advertisement, and there was no defect in the proceedings.

Action in the district court for Ramsey county to set aside the foreclosure of a mortgage by advertisement. The case was tried before Kelly, J., who made findings and as conclusions of law ordered judgment in favor of plaintiff that the foreclosure by advertisement and sale of the land be vacated. From an order denying defendant's motion for a new trial, he appealed. Reversed.

John D. O'Brien, Dillon J. O'Brien and *Charles Bechhoefer,* for appellants.

Otto Kueffner, for respondent.

BUNN, J.

This is an action to set aside a foreclosure of a mortgage. The decision below was in favor of plaintiff, and defendant appealed from an order denying a new trial.

The mortgage foreclosed was given by plaintiff and his wife to the Citizens Savings Bank January 3, 1907, and recorded on the same day. It contained the usual power of sale. January 5, 1907, plaintiff began proceedings to register his title under the Torrens law. February 26, 1908, the mortgage was assigned to Magdalena Huebscher, which assignment was recorded February 7, 1910. The proceedings to register the title under the original application went so far as the issuance and service of summons; but nothing beyond this was done until April 18, 1910, when a new or amended application was filed. The examiner reported that the mortgage had since his last report been assigned to Magdalena Huebscher, and referred to the book and page of its record. Magdalena Huebscher was not, however, made a party to the proceedings or served with the summons. The decree entered July 5, 1910, directed registration subject to the mortgage owned by Magdalena Huebscher.

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The original and owner's duplicate certificate, in the memorial attached, recited the amount and date of the mortgage, the book, page, and time of record, and, instead of stating the name of the mortgagee and the fact of the assignment, described the mortgage as "running to Magdalena Huebscher." Magdalena Huebscher died, and George W. Stenger was appointed administrator of her estate in March, 1910. July 27, 1910, Stenger, as administrator and "in his own right," assigned the mortgage to M. A. Erne. Prior to this time there appears of record an assignment of the mortgage from Anton Huebscher to Stenger, but no title in Anton is shown. In September, 1910, Erne assigned the mortgage to Stenger, who thereafter commenced the foreclosure proceedings which this action is brought to set aside. All of the assignments were recorded in the office of the register of deeds, and all were filed with the registrar of titles. Each was noted on the memorial attached to the original certificate of title.

The basis of the trial court's decision holding the foreclosure void was the failure of the memorial attached to the certificate of title to note the assignment of the mortgage from the Citizens Savings Bank to Magdalena Huebscher; the court holding that the notation that the mortgage was one "running to Magdalena Huebscher" did not satisfy the provisions of section 55, c. 305, p. 478, Laws 1905, which say that "where the mortgage is upon registered land it shall be sufficient to authorize the foreclosure thereof by advertisement, if such mortgage and all assignments have been registered, and *a memorial thereof duly entered* upon the certificate of title.

We are unable to sustain the decision of the trial court. When the mortgage was given, and when it was assigned to Huebscher, the land was not registered land. The decree of registration recited the fact of the assignment, and directed registration subject to a mortgage owned by Huebscher. At the time the certificate was issued, therefore, the land was subject to a mortgage then owned by Magdalena Huebscher, and we think it was wholly unnecessary to note on the memorial the assignments which showed when and how she acquired her ownership. The provisions of section 55 were not intended to apply to

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assignments made before the land was registered, but only to those which assigned a mortgage on lands registered at the time the assignment was made or filed for record. That this is the proper construction of section 55 is apparent from the other provisions of the act. Under the construction of the trial court, it would be necessary to note on the memorial all assignments prior to the decree, although the decree itself need not, and probably would not, refer to such assignments, but simply, as was done in this case, adjudge that the land was subject to a certain mortgage now owned by whoever was the present owner. The certificate complied with the decree, and there was no possible prejudice to the mortgagor.

Again, it would be strange if the mortgagor could defeat the right to foreclose by advertisement by any act of his, without the consent of the owner of the mortgage. He procured the registration and conducted the proceedings. Indeed, as we have said, the owner of the mortgage was not even a party to the proceedings. We hold that the memorial was sufficient under section 34 of the act [at p. 469] requiring that the certificate "shall by memorial contain a brief description of all incumbrances * * * to which the estate of the owner is subject," and that section 55 [p. 478] does not apply to assignments made before the decree. The assignments made after the land was registered are properly noted on the memorial to the original certificate, and, so far as the provisions of the Torrens act are concerned, the right of the defendant to foreclose his mortgage by advertisement had not been lost.

It remains to consider whether there is any fatal defect in the foreclosure proceedings under the statutes regulating foreclosures by advertisement. The notice complied fully with the statute. It described the mortgage and each assignment, gave the time, book, and page of the record of each, and also the fact that, and dates when, each was filed with the registrar of titles. In short, the notice showed a complete and perfect record title to the mortgage in defendant. It also recited the assignment from Anton Huebscher to defendant, though it was apparent that Anton had no interest to assign. As this assignment appeared of record, it was probably neces-

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sary to recite it in the notice; but clearly neither its existence of record, nor the fact that the notice referred to it, in any way affected the right to foreclose the mortgage under the power of sale. There is no doubt that foreclosure by advertisement is a statutory remedy, and that all the essential requisites must be strictly followed, or the proceedings will be held void. But we think they were followed in this case, and that there is no ground upon which plaintiff can legally be given the relief he seeks. The notice was sufficient, whether the mortgage was upon registered land or unregistered land. It fully complied with the statutes as amended with reference to foreclosures of mortgages on registered land. All of the other proceedings were regular, and, as we hold that defendant had not lost his right to foreclose by advertisement by reason of any defects in the record or registration of the mortgage or its assignments, it follows that the foreclosure was valid.

Order reversed.

W. A. MARIN v. AUSTIN C. KNOX and Others.[1]

May 10, 1912.

Nos. 17,646—(169).

Purchase-money mortgage — lien of judgment against vendee.

Where a mutual agreement is made, between a vendor in a contract to convey land, the vendee therein, and a third party, that the vendee is to obtain money to pay part of the balance of the purchase price from such third party, securing the same by a first mortgage upon the land, and the vendor is to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and mortgages are executed and delivered, such mortgages are superior to the lien of a judgment obtained against the vendee prior to the delivery of the mortgages.

Same.

If such deed and mortgages be executed and delivered pursuant to such

[1] Reported in 136 N. W. 15.

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mutual agreement, it constitutes but one transaction, although the documents may not have been delivered on the same day.

Same — evidence.

The evidence examined, and *held* to sustain the finding that the mortgages of the defendants were purchase-money mortgages, and entitled to priority over the title acquired by plaintiff through execution sale on a judgment obtained against the vendee prior to the delivery of the mortgages.

Action in the district court for Otter Tail county to determine adverse claims to certain real estate. The reply denied that on or about May 1, 1908, defendant Keplinger was the owner of the premises; and alleged that plaintiff recovered judgment in the district court for Otter Tail county against Austin C. and Anna Knox, and upon execution sale of the premises on January 23, 1909, bought in the property, and that no redemption therefrom had been made by either the judgment debtors or by the defendants. The case was tried before Taylor, J., who made findings and as conclusions of law found that plaintiff was the owner of the real estate described in the complaint, subject to the lien of each of the three mortgages mentioned in the opinion, and that the lien of the mortgages was paramount and superior to the title of plaintiff. From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Charles Loring and *W. A. Marin,* for appellant.

Parsons & Brown, for respondents Thorp, Brown and Keplinger.

Holt, J.

In this action, brought to determine the adverse claims to one hundred twenty acres of land in Otter Tail county, the three defendants, John W. Thorp, James A. Brown, and E. R. Keplinger, answered, each claiming a mortgage lien superior to plaintiff's estate in the premises. The trial resulted in findings that plaintiff was the owner, subject to the liens the defendants asserted. From the judgment entered upon these findings, this appeal is taken.

On December 18, 1902, the defendant Keplinger was the owner of the land, and on that day gave defendant Austin C. Knox a con-

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tract agreeing to convey for $3,200. Knox went into possession and made certain payments, but not as agreed, and prior to December, 1907, he removed from the state. On April 21, 1908, $2,116.40 was due and unpaid on the contract. Keplinger, at this time residing on the Pacific coast, was in need of the money, and urged Knox to close up the deal. Finally, through agents and friends, an agreement was made whereby Knox, upon receiving the deed to the land, was to give a first mortgage thereon to raise $1,500 to pay Keplinger upon the amount due for the purchase price and give a second mortgage for $616.40 to Keplinger to secure the balance thereof. The defendant Thorp, through his agent, defendant Brown, agreed to take the first mortgage for $1,500, due in ten years, with seven and one-half per cent interest; but, since Brown was to receive from Thorp for the services rendered all of the interest above six per cent, the $1,500 mortgage was made to draw only six per cent interest annually, and a separate mortgage made to Brown to secure the one and one-half per cent interest. Also a mortgage for $616.40 was made to Keplinger.

The deed from Keplinger to Knox was dated January 13, 1908. The mortgages to Thorp and Brown were dated April 11, 1908, and that to Keplinger dated April 21, 1908. The Thorp mortgage was filed for record April 23, 1908, the Brown mortgage May 1, 1908, at 4 p. m., the deed to Knox May 1, 1908, at 4:40 p. m., and the Keplinger mortgage, May 7, 1908. The testimony shows that Mr. Baker, Keplinger's agent, did not deliver the deed until he received the mortgage from Knox for the balance of the purchase price. Plaintiff obtained title to the property upon an execution sale under a judgment rendered and docketed in the district court of said county, in his favor and against the defendant Austin C. Knox, May 24, 1907, for $210.68.

Ever since the decision of Banning v. Edes, 6 Minn. 270 (402), it has been the law in this state that a purchase-money mortgage has priority over a previously docketed judgment against the mortgagor. Hence plaintiff's ownership must necessarily be subject to Keplinger's mortgage for $616.40, unless the latter lost his right by per-

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mitting the other two mortgages, if they be not also purchase-money mortgages, to obtain priority over his. Reilly v. Williams, 47 Minn. 590, 50 N. W. 826. The defendants Thorp and Brown insist that their mortgages are purchase-money mortgages. If this be true, the judgment is right. It is also the settled law in this state that a person other than the vendor may obtain a purchase-money mortgage, so called, thereby acquiring the same equities as would the vendor, had he taken the mortgage. Jones v. Tainter, 15 Minn. 423 (512); Stewart v. Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. 651. See also Carey v. Boyle, 53 Wis. 574, 11 N. W. 47; Cowardin v. Anderson, 78 Va. 88; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. 519. Therefore the only question here is: Does the evidence sustain the court's finding that these mortgages to Thorp and Brown were such that they may be considered in a legal sense purchase-money mortgages?

The evidence is clear that every dollar obtained by means of these mortgages, namely, $1,500, was paid to Keplinger upon the purchase price, and that the deed to Knox was not delivered until this money was turned over. The court had also ample warrant for finding that it was agreed between all the parties concerned that the delivery of the deed was to be part of the transaction of executing all three mortgages as purchase-money mortgages, to take precedence among themselves as therein agreed. The only doubt that might be entertained as to the correctness of the disposition of the case by the lower court arises from the Brown mortgage. But this vanishes when the situation and agreement of the parties are considered. The loan agreed to be made by Thorp through Brown was for $1,500, payable ten years from date, with seven and one-half per cent interest per annum. Thorp resided in New York, his agent in Minnesota. Between them there was an understanding that Brown should receive for his services part of the agreed interest as it was paid in. To carry out this agreement, the two mortgages were made; that one of Mr. Brown being very brief, conditioned to be void if $22.50 was paid on April 11 annually for ten years, this being the same date as the six per cent interest stipulated in the Thorp mortgage became due. In reali-

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ty, the two constitute but one mortgage, securing the $1,500 borrowed and used to pay for the land, and the agreed interest thereon, namely, seven and one-half per cent per annum.

Plaintiff also claims that, since the deed and the mortgages were not executed simultaneously, the mortgages may not be regarded as purchase-money mortgages. It is true that the Thorp mortgage was recorded before the Keplinger mortgage was acknowledged, and hence must have been delivered before. But we must consider the situation of the parties and their agents. Each one of the four parties to the transaction resided in a state where none of the others were. Their agents were not in the same town. Under these circumstances, a few days' difference in the delivery of the instruments that completed the one transaction is not significant. Stewart v. Smith, supra; Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. 422.

Plaintiff earnestly contends that, because the contract for purchase of the land was made in 1902, there could be no agreement to take back a purchase-money mortgage in 1908; the written contract containing no provision for a mortgage. We fail to see the force of this position.

In Laidley v. Aikin, 80 Iowa, 112, 45 N. W. 384, 20 Am. St. 408, the contract to convey had been given three years before the purchase-money mortgage was made. Knox had failed to make the payments stipulated in the contract, and Keplinger, by giving the thirty-day notice required, was in a position to terminate all rights under the contract. In this situation, had Keplinger given a deed upon receiving back a mortgage from Knox for the amount due and unpaid, could it for a moment be claimed that the mortgage was not entitled to be considered as a purchase-money mortgage? When plaintiff obtained his judgment, it did not become a lien on the unpaid amount of the purchase price, and he should not be heard to object to whatever agreement the parties mutually agreed upon to secure the same, as long as the equity of Knox in the land was not diminished.

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We conclude, from the examination of the testimony and admitted facts, that the court was fully warranted in finding that at the time the mortgages were delivered $2,116.40 was due Keplinger upon the purchase price of the land; that the execution and delivery of the deed by Keplinger to Knox, and the mortgages from the latter to Thorp, Brown, and Keplinger, together with the payment to Keplinger of the proceeds of the $1,500 loan upon the unpaid purchase price of the land, constituted but one transaction; that the intent and agreement of all said parties was that the title to the land should vest in Knox, subject to the purchase-money mortgage liens of said three mortgages; and hence that said three mortgages in fact do represent and secure the payment of the purchase price of the land, and no other amount whatsoever.

The authorities relied on by appellant (Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201; Van Loben Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266; Small v. Stagg, 95 Ill. 39) are not applicable, because either it was shown that the money was a mere loan, with no agreement between the vendor, vendee, and mortgagor that the mortgage should be a purchase-money mortgage, or else no agreement to so consider the mortgage between these interested parties was proven. The cases of Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193, and Heuisler v. Nickum, 38 Md. 270, 278, were decided upon the effect given to the recording statutes of those states.

Judgment affirmed.

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FRED R. BABCOCK and Others v. CANADIAN NORTHERN RAILWAY COMPANY.[1]

May 10, 1912.

Nos. 17,666—(239).

Fire set by locomotive — evidence.

Evidence held sufficient to warrant finding of jury that the fire which caused the injuries sued for was set by the defendant's locomotive.

Amendment of complaint.

Court *held* not to have abused its discretion in allowing amendment of complaint to conform to proof, by changing the plaintiff's allegation of ownership of the lands damaged by the fire herein involved and on which the personalty destroyed or injured by such fire was situated to an allegation of interest as entryman under the homestead laws.

Same — continuance.

Court *held* not to have abused its discretion in denying the defendant's application for a continuance on account of such amendment.

Homestead entry — ownership of timber cut.

A homestead entryman, in possession of his claim under a valid entry, is, except as between himself and the United States, the owner of all timber cut by him on the said claim, and need not, in an action for the destruction by fire of timber so cut and piled on the said premises, allege and prove that the said timber was cut in good faith for the purpose of preparing the land for tillage.

Assignment of claim.

In an action for injury and destruction of personalty by a fire alleged to have been set by defendant's locomotive, evidence *held* sufficient to show an assignment of the property-owner's claim for such injury and destruction to the plaintiffs.

Objection to evidence insufficient.

Objection to certain instruments offered in evidence as being "incompetent, irrelevant, and immaterial" *held* insufficient to challenge the admissibility of such instruments on the ground that they involved or grew out of an illegal transaction.

[1] Reported in 136 N. W. 275.

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Claim assignable.

A claim for damages for the destruction of personal property by fire is assignable.

Assignment of claim by the insured.

An assignment of claim for damages to personal property by fire to the plaintiffs, who, as insurers of the said property, paid the loss to the owners, *held* not based upon the policy pursuant to which such payment was made, and hence not affected by any illegality which may have existed in the policy.

Eleven actions[1] in the district court for Polk county against the Canadian Northern Railway Company to recover for damages to property caused by fire set by defendant's locomotive. The substance of the pleadings will be found on pages 439, 440 and 442. The cases were tried before Watts, J., and one jury, under an agreement that they were to be tried as separate cases, and a separate verdict rendered in each case, and that each case was to stand independently of the others upon all of the evidence applicable to that case. At the close of the trial defendant's motion in each case for a directed verdict in its favor was denied. The jury returned a verdict in favor of each plaintiff as follows: Fred R. Babcock $1,036.64, James Clark $1,270, Thomas Hanbury $1,067, William J. Brennan $809, John R. Stone $265, Wheeler-Misner Loan Co. $325, Hans Christensen $1,098, Frank Levasque $753, Andrew P. Peterson $930, Edith Hall $525, Patrick Hanbury $695, and Mary Peterson $968.

Defendant appealed in each case from the order denying its motion for judgment notwithstanding the verdict or for a new trial. Affirmed in each case.

Hector Baxter and *Washburn, Bailey & Mitchell,* for appellant.

Albert Chilgren, Charles Loring and *G. A. Youngquist,* for respondents.

[1] James Clark, Thomas Hanbury, William J. Brennan, John R. Stone, Wheeler-Misner Loan Company, Hans Christensen, Frank Levasque, Edith Hall, Patrick Hanbury and Mary Peterson against the Canadian Northern Railway Company.

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PHILIP E. BROWN, J.

These eleven actions were brought to recover damages alleged to have been suffered by the plaintiffs in consequence of a fire claimed to have been set by one of the defendant's locomotives on September 29, 1910. The cases were tried before one jury under stipulation that they should be tried as separate cases, all evidence admissible as to any one of them to be received and by the jury applied to the case to which it was applicable, and separate verdicts to be rendered. Plaintiffs had verdicts in all of the actions, motions were made in the alternative for judgment notwithstanding the verdict or for a new trial, but were denied, and this appeal was taken. The cases must be disposed of here as separate cases. The Babcock case involves some questions not common to any of the others, and likewise the Christensen, Hall, and Thomas Hanbury cases. All of the cases, however, involve the question of the origin of the fire.

1. The defendant strenuously contends that the evidence is insufficient to sustain the finding of the jury that the fire was set by it.

It appears without conflict that on September 29, 1910, shortly after one o'clock in the afternoon, a fire was discovered on the north side of the defendant's right of way, nearly midway between the stations of Williams and Cedar Spur, in Beltrami county; that the distance between these stations was about two and one-half miles, the former being west of the latter, and the track between them was straight; that there was no wagon road directly connecting these stations, and that persons walking from one to the other customarily walked along the railroad track; that the summer and early fall of 1910 were very dry, and that the right of way on the north side of the track, near where the fire started, was incumbered with dry grass and other combustible material; that during the said summer and fall fires were burning in numerous directions from such point, and the country for many miles in all directions was timber land, consisting of cedar and tamarack, most of which had been cut over and the slashing of dead timbers left lying on the ground; that most of this country had been homesteaded, and many of the settlers had been fighting fires throughout the said summer and fall, and that some

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of these fires were burning at the time the fire in question started, none of them, however, being near; that at the time such fire started a hard wind was blowing from the south, or a little to the west of south; and that the defendant's locomotives were equipped with spark arresters to prevent the escape of sparks and fire. It was conceded by the defendant's counsel on the oral argument in this court that the fire in question, after it started as aforesaid, spread to the lands of the several plaintiffs herein, and burned or injured the property described in their several complaints.

In addition to the foregoing undisputed facts, there was evidence in the case which, if believed, would have warranted the jury in finding the following facts: That on September 29, 1910, at about one o'clock, p. m., an east-bound freight train, owned and operated by the defendant, consisting of a locomotive and forty loaded cars, stopped at Williams and then proceeded east, working heavily, and between Williams and Cedar Spur emitted large quantities of smoke, and about three-quarters of a mile from Cedar Spur the locomotive was working; that the track between these stations is nearly level, except for a slight upgrade, for some distance to the east of Williams; that at about the time the said train started east from Williams no person was seen at or near the point where the fire in question started, though a person at either of these stations could see to the other station and beyond, and there were persons in a position to have seen anyone who might have been at such point at such time; that, notwithstanding that there were persons who could have seen from one of these stations to the other at the time such fire started, no smoke or other evidence of fire was seen at such point until after the passage of the said train, and that the engineer in charge of the train saw no fire at or near such point, though it was his duty to report any fire seen by him on the right of way; that about seven minutes after the train passed the point where the fire started smoke was seen at such point, and that seven minutes later fire was discovered at such point, on the north side of the defendant's right of way, burning along both sides of the fence on such right of way, north of the track, about one hundred feet having burned along such fence when the fire was so discovered.

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There was also evidence, given on behalf of the defendant, tending to show that its locomotive in question was properly constructed to prevent the escape of fire, that it had been duly inspected, and that the best quality of coal was used; and there was no evidence that sparks or fire were seen escaping from such locomotive at the point where the fire started.

In Karsen v. Milwaukee & St. Paul Ry. Co. 29 Minn. 12, 11 N. W. 122, Justice Mitchell, in disposing of a contention that there was no evidence that the fire which caused the injury was set by the defendant's locomotive, said [at page 13]: "The evidence tended to show that the fire started in the grass near and to the leeward of defendant's track a few minutes after a train had passed; that there was quite a stiff breeze; that there was no person, and no other fire than that of the passing engine, in the vicinity at the time. It being a matter of common knowledge that engines do emit sparks which start fires in this way, and there being no other apparent probable explanation of the origin of the fire, we think these facts rendered it highly probable that this fire was set from the passing engine, and fully warranted the jury in so finding."

The rule thus announced was followed and applied against the defendant's contention in Sibley v. Northern Pac. R. Co. 32 Minn. 526, 21 N. W. 732; Dean v. Chicago, M. & St. P. R. Co. 39 Minn. 413, 40 N. W. 270, 12 Am. St. 659; Hoffman v. Chicago, M. & St. P. R. Co. 40 Minn. 60, 41 N. W. 301, and McClellan v. St. Paul, M. & M. Ry. Co. 58 Minn. 104, 59 N. W. 978, and is, we think, so well established that it cannot now be questioned, notwithstanding the consequence of its application flowing from the provisions of Laws 1909, p. 454, c. 378 [R. L. Supp. 1909, § 2041], to the effect that the liability of the railroad company becomes absolute upon proof that it set the fire. The defendant contends that in view of this statute, which virtually makes the railroad company an insurer against damages caused by fires set by its trains, the plaintiff now must establish the origin of the fire by stronger proof than has heretofore been required. But the plaintiff has always had the burden of establishing a state of facts from which the jury might reasonably

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infer that a fire starting on or near a railroad right of way and tracks was started by a train or some other agency for which the defendant is responsible; and the statute referred to does not change this rule. It neither diminishes nor increases the plaintiff's burden in the matter of proof so far as the origin of the fire is concerned.

The defendant cites Minneapolis S. & D. Co. v. Great Northern Ry. Co. 83 Minn. 370, 86 N. W. 451, a case involving the destruction of urban property; but that case is clearly distinguishable from the cases above cited and the one at bar, as is apparent from the language used at page 375 [86 N. W. 453], where Lovely, J., in delivering the opinion of the court says: "Where a train passing through the open country is followed in close proximity of time thereafter by a fire which starts up near its right of way, by a reasonable process of induction, based upon the physical facts, all other causes of the fire might be excluded, and an inference justified that the fire was dropped from the smokestack; but the facts are quite different here, where other causes might well have intervened to occasion the fire." We think that the physical facts in the case before us were sufficient to warrant the jury in its finding that the fire in question was set by the defendant's locomotive.

2. The complaints in the Christensen, Hall, and Thomas Hanbury cases each alleged that the plaintiff was the owner of the lands described therein and that the premises were damaged, and also that a quantity of ties, posts, poles, etc., on the said premises were damaged or destroyed by the said fire. On the trial it appeared that the plaintiff Christensen was in possession of the land described in his complaint at the time of the fire, but that the only interest he had therein was under a homestead entry made in May, 1905. In the Hanbury case the same facts were shown, except that Hanbury's entry was made in February, 1905. The same showing was made in the Hall case, except that the plaintiff's entry was made in July, 1910. The court, on such trial, after it appeared that the said several plaintiffs' titles to their respective lands consisted of their interests under their several entries under the homestead laws, permitted them to amend their complaints by so alleging, against the objection of the

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defendant, and the court thereafter denied the defendant's application to continue the said cases because of the making of such amendments. The defendant assigns these rulings as error. The granting of applications of this character rests in judicial discretion, and it does not appear that there was any abuse of such discretion in, or that any prejudice resulted to the defendant from, such rulings. The defendant's assignment of error in this regard cannot, therefore, be sustained.

In the three cases last mentioned the defendant claims that the plaintiffs therein were not the owners of the timber described in their said complaints, for the reason that such timber was cut from their homesteads, and hence that they could not recover for the loss thereof, unless it appeared that they were acting in good faith, with the intention of clearing up the land and making it a home, when they cut the said timber, and that the question of their good faith was one of fact for the jury. This claim had no foundation whatever to rest upon in the Hall case, for it does not appear that any of the cut timber destroyed or damaged by the said fire on her premises was cut thereon. It is very doubtful if there is any evidence in the Christensen and Thomas Hanbury cases to warrant the submission of the question of their good faith in cutting the timber therein involved to the jury, even if the defendant's contention in this regard is otherwise correct; for each of these plaintiffs testified that his purpose in cutting the said timber was to clear the land for the purpose of cultivation, and there was no testimony except that of the plaintiffs on this point. However, we do not care to determine the defendant's contention on this ground, nor on the ground that the defendant made no request for the submission of the question of the plaintiffs' good faith to the jury.

The court instructed the jury that "a homesteader who has cut timber on his homestead is the owner of it, if he has not parted with the title, as against every one but the United States, and is to be so considered." The defendant claims that this instruction was erroneous; that since the Federal statute [35 St. 1098, c. 321, § 49, U. S. Comp. St. Supp. 1911, p. 1604] makes it a crime to cut

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or cause to be cut timber on the public lands of the United States, subject to the following proviso: "Nothing in this section shall prevent any miner or agriculturalist from clearing his land in the ordinary working of his mining claim or in the preparation of his farm for tillage or from taking the timber necessary to support his improvements or the taking of timber for the use of the United States"—it was incumbent upon the plaintiffs to plead and prove that the said timber was cut in the preparation of their claims for tillage.

To sustain this contention several Federal cases have been cited; but we do not consider any of them to be in point. They hold that, where timber is cut contrary to the provisions of the statute above cited, the entryman acquires no right or title thereto as against the United States, or that a mere trespasser on lands of the United States cannot recover for the destruction of timber cut therefrom.

The rights of a homesteader in the premises are declared by Gilfillan, C. J., in Carner v. Chicago, St. P. M. & O. Ry Co. 43 Minn. 375, at page 376, 45 N. W. 713, where the Chief Justice, in speaking of the rights of a timber claim entryman, says: "Plaintiff was not in wrongful possession of the land, as was the case in Lindsay v. Winona & St. Peter R. Co. 29 Minn. 411.[1] By his entry and compliance with the terms of the act he had acquired vested rights, even as against the United States. We held that in Red River, etc. R. Co. v. Sture, 32 Minn. 95,[2] in respect to one entering lands under the homestead acts of Congress, the rights under the homestead acts, though differently acquired, are no greater than those under the timber culture act. Under the latter act, the party entering has the right to occupy and cultivate the land, and owns the annual crops which he harvests, whether of grass, not sown by him, or of grains. As against the United States, he may not have a right to cut the trees for removal and sale, or for any purpose other than the proper cultivation of the land. His rights are analogous to those of one

[1] 13 N. W. 191.

[2] 20 N. W. 229.

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under a contract to purchase, in which case the vendor might ordinarily, unless the contract provided otherwise, prevent the commission of waste. But as against third persons he is the owner." We are satisfied with the rule thus stated.

It appears that both Christensen and Thomas Hanbury had been in possession of these lands under valid entries for more than five years. We hold that for all practical purposes they were the owners thereof, and, except as between themselves and the United States, they were also the owners of the timber cut therefrom. Hence, for the purposes of these cases, the instruction given by the court was correct, and the defendant's contention cannot be sustained. The possibility of the United States bringing action against the defendants for the destruction of the timber cut by the entrymen on these claims and of which they were in possession is no defense to the defendant in these actions.

3. In the case designated herein and in the record as the Babcock case, the plaintiffs, Fred R. Babcock and fourteen others, alleged that they constituted an association organized for the purpose of insuring property against loss by fire, operating under a charter granted by the state of New York, and that they were authorized to transact business in the state of Minnesota; that on June 21, 1910, the said plaintiffs issued their certain policy, No. 30,015, insuring certain personal property belonging to the firm of Wetherby & Ecklund, at Cedar Spur, Minnesota, in a sum exceeding the loss hereinafter mentioned; that thereafter, while such policy was still in force, a portion of the said property, of the value of $1,057.80, was destroyed by a fire set by the defendant's locomotive; that thereafter the said plaintiffs settled with the assured, pursuant to the said policy, for the sum of $1,036.64, whereupon the assured delivered to the plaintiffs a receipt in full for such loss, and assigned and transferred to the plaintiffs each and all claims and demands against any person or corporation arising from or connected with such loss or damage, and subrogated the plaintiffs in their place and stead to all such claims and demands. The answer interposed by the defendant consisted of a general denial and an allegation of negligence

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on the part of the said Wetherby & Ecklund and the absence thereof on the defendant's part.

On the trial the plaintiffs introduced in evidence over the defendant's objection as "incompetent, irrevelant, and immaterial," the insurance policy so alleged, an assignment by Wetherby & Ecklund of their claim against the defendant for the loss occasioned by the fire to the "Lumber Underwriters of New York," and a receipt executed by Wetherby & Ecklund to the "Lumber Underwriters of New York," acknowledging the settlement of the said loss by the latter, which said policy, assignment, and receipt were respectively designated as Exhibits A8, A9, and A10. The only evidence of the identity of the plaintiffs with the said Lumber Underwriters consisted of the said policy, which was entitled "Lumber Underwriters of New York" and purported to bind the plaintiffs individually as insurers thereunder, and the testimony of Ernest Wetherby, of the firm of Wetherby & Ecklund, hereinafter referred to; and the only evidence of the payment of anything by the plaintiffs to the said firm, or of any assignment by the latter to the former, consisted of the said Exhibits A9 and A10, both of which carried the same number as said policy and referred thereto, and the testimony of the said Ernest Wetherby to the effect that the said property was insured by Fred R. Babcock and others named in the said policy as constituting the Lumber Underwriters of New York, that they paid his said firm $1,036 under the terms of the said policy, and that he signed Exhibits A9 and A10 and delivered them to the said Lumber Underwriters. No proof was made of the plaintiffs' organization as an association.

The defendant contends that there was no proof of any assignment by Wetherby & Ecklund of their claim against the defendant to the plaintiffs. But as the instruments, A8, A9, and A10, and the evidence of Ernest Wetherby above recited, plainly show payment of the loss by the "Lumber Underwriters of New York," and an assignment of the claim, for the damage done by the fire, to such Underwriters, the only possible ground for such contention is that the identity of the plaintiffs with such Underwriters was not shown.

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This objection is technical. We think the evidence above recited is abundantly sufficient to show the identity of the plaintiffs with the said Underwriters unless it should be held, as contended by the defendant, that the said Exhibits A8, A9 and A10 ought not to have been admitted in evidence.

It appears, however, that the only objection made by the defendant to the admission of these instruments was that they were "incompetent, irrelevant, and immaterial," and this objection was insufficient to call the court's attention to the point now made that the said policy, Exhibit A8, was illegal, in that it did not comply with R. L. 1905, § 1640, and subjected the party or parties who issued it to the penalty prescribed by section 1641. Again, the court instructed the jury that Wetherby & Ecklund assigned to the plaintiffs their right to recover damages for the defendant for the personal property destroyed or injured by the said fire, and that the plaintiffs were entitled to recover if the jury found in their favor such sum as damages as Wetherby & Ecklund would have been entitled to, had they not assigned the claim. To this instruction no objection was made, either at the trial or in the motion for a new trial, and hence the defendant is not in a position to urge the objections now made. This aside, the defendant's claim that a cause of action arising out of damages caused by the destruction of property by fire is not assignable under our statutes cannot be sustained. R. L. 1905, § 4502; 1 Dunnell, Minn. Digest, § 564; Hansen Mercantile Co. v. Wyman, Partridge & Co. 105 Minn. 491, 117 N. W. 926, 31 L.R.A.(N.S.) 727.

Neither can the defendant's contention that the plaintiffs' right to recover is based upon an unlawful insurance policy be sustained; for it appears that the plaintiffs' right to recover is founded upon the said assignment, and the illegality of the policy is not involved in this suit. Clearly Wetherby & Ecklund had the right to collect from the defendant the value of their property destroyed by a fire set by it, and also the further right as against the defendant, to assign such right of recovery to any one they saw fit. The consideration thereof, or the transaction which induced the assignment, is not material to the defendant, and it cannot take any advantage of any illegality

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therein. The plaintiffs could have established their case without the aid of any illegal transaction, conceding that the said policy was illegal; for the alleged illegality of the policy rests in its terms, which are wholly immaterial to this case. The mere fact that an illegal transaction incidentally appears in the course of the establishment of the plaintiff's case is very different from the case where the plaintiff's claim is dependent upon such a transaction, so that to allow him to recover would be to recognize the illegal transaction and allow him to receive the benefit thereof. Until the payment of the loss under the policy, here attacked by the defendant, the benefit thereunder, if any recognizable by the courts, was to the assured, with a corresponding liability upon the plaintiffs. Certainly any illegality in the policy would not have prohibited the plaintiffs from discharging such liability by paying the loss to the assured, and hence we do not see how it can successfully be contended that the assignment they received from the assured, after or at the time of such payment, was a benefit under the policy. The policy and the loss thereunder were the mere circumstances that led up to or furnished the occasion for the assignment, and we do not think the latter can, in any legal sense, be said to depend upon the former. In this view of the case the cases cited by the defendant (Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856, and kindred cases decided by this court) upon the right to invoke an illegal transaction in aid of a recovery are clearly distinguishable.

Orders affirmed.

On June 3, 1912, the following opinion was filed:

PER CURIAM.

Appeals by the plaintiffs from the clerk's taxation of costs.

A statement of the facts sufficient for a general understanding of the matter here in controversy in all the cases involved in this appeal, excepting the Andrew P. Peterson case, occurs in the opinion The action last referred to was included in the defendant's appeal, but was dismissed later. The plaintiffs sought to tax $25 as statutory

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costs in each of the actions, excepting the said Peterson case, wherein they claimed the right to tax $10 for its dismissal. The defendant objected to a greater allowance than $35 in all of the cases together, substantially on the ground that only one appeal was taken, and that, while they were separate actions in form, they constituted but one in fact.

The same fire caused all the losses, and the same attorneys appeared for the plaintiffs in all of the cases. Only one argument was made on the appeal, and only one paper book was printed and one brief served.

It was stated in the opinion that "the Babcock case involves some questions not common to any of the others, and likewise the Christensen, Hall, and Thomas Hanbury cases." In what respect these cases differed from the others is sufficiently disclosed in the opinion.

The allowance of statutory costs in this court is a matter of discretion. The court has provided by rule 29 that unless otherwise ordered the prevailing party shall recover costs as follows: (1) Upon a judgment in his favor on the merits, $25. (2) Upon dismissal, $10.

We are of the opinion that the circumstances of these several cases require the court otherwise to order, and we hold that the plaintiffs are entitled to $25 statutory costs in the Babcock case, and to the same amount in the Christensen, Hall, and Thomas Hanbury cases, considering them as one case, and a like amount for all the other actions, likewise considered as one case, excepting the Andrew Peterson action, wherein $10 should be taxed, making the total statutory costs to be taxed for all the plaintiffs the sum of $85, to be apportioned pro rata by the clerk to the plaintiffs in the several actions.

It is so ordered.

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CLARENCE H. VENNER v. GREAT NORTHERN RAILWAY COMPANY and Others.[1]

May 17, 1912.

Nos. 17,301—(22).

Corporation — action to compel restoration of property — complaint.

In an action by a minority stockholder to compel the restoration to the corporation of property acquired by it through investments beyond and in violation of its charter powers, and subsequently unlawfully disposed of without consideration, and for the sale thereof under decree of the court for the benefit of all the stockholders, it is *held* that the complaint states a cause of action for at least a part of the relief demanded, and the demurrer thereto was properly overruled.

Joinder of causes of action.

Separate causes of action *held* not improperly united in the complaint.

Action in the district court for Ramsey county against Great Northern Railway Company, Lake Superior Company, Limited, James J. Hill, Louis W. Hill and Robert I. Farrington, and James N. Hill, Louis W. Hill, Walter J. Hill and Edward T. Nichols, as trustees under an agreement of trust dated December 7, 1906, with Lake Superior Company, Limited. The amended complaint prayed for a judgment decreeing that the agreement between the railway company and the Superior Company, dated October 20, 1899, and the trust agreement between the Superior Company and the defendants James N. Hill, Louis W. Hill, Walter J. Hill and Edward T. Nichols, dated December 7, 1906, and all transactions pursuant to said agreements, and each of them, were illegal and void, and that the same be set aside; that any and all securities and property held by the Superior Company or by the trustees were the property of the railway company, and that the Superior Company and the trustees transfer the same to the railway company, or such receiver as the

[1] Reported in 136 N. W. 271.

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court might appoint, to fully vest the legal title of the same in the railway company or such receiver; that the Superior Company and the trustees account to the railway company, or to such receiver, for all moneys that at any time had or might come into their hands from the property acquired under such agreement or purchase with funds belonging to the railway company; that the railway company and its president and other defendants who are officers or directors be perpetually enjoined from further buying, owning or holding, either directly or indirectly, through the Superior Company or through the trustees, or through any of the corporations mentioned in the complaint or through other corporations, any of the securities described in the complaint, and from engaging in any line of business complained of in the complaint; that the railway company or any receiver who may be appointed at once dispose of any and all securities and property of the kind referred to in the complaint and distribute the net proceeds among the stockholders of the railway company; and that a receiver be appointed.

From an order, Bunn, J., overruling their separate demurrers to the complaint, defendants took separate appeals. Affirmed.

E. C. Lindley and *M. L. Countryman,* for appellants.

Edward B. Graves and *Elijah N. Zoline,* for respondent.

Brown, J.

Action in equity by plaintiff, a stockholder of the Great Northern Railway Company, a corporation, in his own behalf and in behalf of all other stockholders, to compel the restoration of certain property acquired by the corporation as the result of transactions beyond its charter powers, and not used or devoted to the operation of the railway, a part of which is alleged to have been wrongfully and unlawfully transferred to the other defendants, for the sale of the same and the distribution of the proceeds to the stockholders of the corporation. Defendants separately demurred to the complaint, assigning as grounds thereof: (1) The improper joinder of causes of action; and (2) that the complaint fails to state facts constituting a cause of action against any of the defendants. The demurrers were overruled, and defendants separately appealed.

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A statement in the abstract of the facts alleged in the complaint will sufficiently disclose the scope and purpose of the action and the questions necessary and proper to be determined at this time. A detailed statement of the facts alleged would serve no useful purpose and result in unnecessarily extending the opinion.

The Great Northern Railway Company is a corporation duly created and existing under the laws of this state, and owns and operates various lines of railway in, through, and beyond the borders of the state. Plaintiff is the owner of three hundred shares of its stock. The complaint alleges that the corporation is the successor in interest of the Minneapolis & St. Cloud Railroad Company, which was organized under chapter 160, p. 294, Territorial Sp. Laws 1856. The defendants claim that the company is the successor also of the Minnesota & Pacific Railroad Company, which was organized under chapter 1, p. 4, Territorial Laws (Extra Sess.) 1857, and that it possesses by that succession all the rights, powers, franchises, and privileges held and possessed by that company. State v. Great Northern Ry. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; State v. Great Northern Ry. Co. 106 Minn. 303, 119 N. W. 202. This question will be referred to further along in the opinion.

The complaint further alleges that prior to October 20, 1899, the defendant railway company had acquired by purchase with money belonging to the company, which should have been used in the operation of the railway, various stocks, bonds, and other securities, of the aggregate value of about $34,000,000. It further alleges that the acquisition of this property was not necessary or appropriate to the management of the railway, and that the purchase thereof was beyond the charter powers of the corporation and unauthorized.

The complaint also alleges that on or about October 20, 1899, defendant James J. Hill, the officers and board of directors of the railway company, and defendants Farrington and James N. Hill, well knowing that the company could not lawfully, under its charter or the laws of the state, purchase, own, or hold the stocks, bonds, and securities mentioned, or become associated in business with the corporations issuing the same, entered into a scheme and plan to enable

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the company to evade its charter and the laws of the state, and to continue to hold, own, and control such properties, and to enable it to control the business and affairs of the corporations issuing the stocks and bonds so purchased, and to that end caused to be formed a limited copartnership under and pursuant to the laws of the state of Michigan, named the Lake Superior Company, Limited, and that the officers and directors of the railway company thereafter transferred all such stocks, bonds, and securities to that copartnership. The Superior Company is alleged to have been formed by James J. Hill, James N. Hill, and R. J. Farrington, with a capital stock of $100,000. The power of this company, as expressed in its articles of association, and its authority in the transaction of its affairs, was that of buying, selling, working, and dealing in mineral lands in the states of Minnesota, Wisconsin, and Michigan; the mining of iron ore and other minerals, and marketing the same; and also investing in stocks, bonds, and securities of other corporations and concerns. James N. Hill ceased to be a member of the company in 1902, and Louis W. Hill was appointed in his place.

The complaint also alleges that the capital stock of the company, $100,000, was never paid in by the members thereof, and that the sole business of the company was the management and control of the stocks, bonds, and securities transferred to it by the railway company. An examination of the articles of association, in connection with the contract transferring the property, discloses that the Superior Company was a mere holding company, and that the affairs thereof, and the manner and method of handling and dealing with the stocks and bonds so transferred, as well as the investment of the income therefrom, were reserved to the board of directors of the railway company. So that at all times the railway company remained the owner in fact of all the securities so transferred, and the management thereof was in the interest and for the benefit of its stockholders. From this it follows that all of the securities now held by that company, and which were not transferred by it as presently to be mentioned, are still owned by the railway company, though held by and in possession of the Superior Company. The complaint alleges that in the man-

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agement of this property, and from the income thereof and from money belonging to the railway company the Superior Company has acquired title to a large amount of other property, some of which consists in iron mines of great value, a particular description of all of which, or the value thereof, plaintiff is unable to state, for the reason that he has been denied access to the books of the railway company where the same appears.

The complaint further alleges that thereafter the directors of the railway company caused to be organized a number of corporations for the purpose of holding, owning, and operating iron mines, manufacturing iron, steel, and other metals, and the general dealing in mineral and other lands; that without consideration, and in furtherance of the scheme of the railway officials to continue in ultra vires transactions, the directors of the railway company caused the Superior Company to convey, separately, to each of such mining companies, certain of the mining lands acquired and held by that company, and further caused the mining companies to issue and deliver to the Superior Company shares of stock in proportion to the value of the property conveyed to each. The complaint also alleges that the transfers to the mining companies were colorable only, and for the purpose of enabling the railway company to continue in the operations of an enterprise and business not authorized by its charter.

The complaint then alleges that on December 7, 1906, defendant James J. Hill and the board of directors of the railway company caused the Superior Company to enter into a certain trust agreement with Louis W. Hill, James N. Hill, Walter J. Hill and Edward J. Nichols, by the terms of which the Superior Company assigned and transferred to the trustees the stock held by it in the several mining companies, of the value, the complaint alleges, of $50,000,000. By the terms of this agreement the stock, and as a result the control of the mining companies and the right to receive the income from the mining and sale of iron ore, passed to the trustees absolutely, to be managed by them in the interest of themselves and the stockholders of the railway company free from any control or supervision by that company.

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The complaint alleges that exorbitant salaries are granted to the trustees, and the agreement, which is attached to the complaint, vests in the trustees the exclusive control of the property. Thereafter the trustees issued and delivered to the stockholders of the railway company certificates of stock in the trust, in proportion to the shares each held in the railway company, which are subject to the sale and assignment as stock of other corporations, and separately or in connection with the sale and transfer of the railway stock certificates. These certificates of stock, or beneficial certificates, as they are termed in briefs, are designated Great Northern ore certificates, and are listed upon the stock markets for sale. The trustees may annually, if they deem it proper, declare a dividend and pay the same to the stockholders, but are not required so to do. The complaint also alleges that this transfer to the trustees was not a bona fide transaction, but a further cover or scheme of the railway officials to shield and conceal the ownership of the company in the property so transferred. The trust continues during the lives of certain minor persons therein named, and may not expire for the period of seventy or more years. At the expiration thereof the property reverts to the Superior Company.

The complaint further alleges that, in addition to the property transferred to the Superior Company, the railway company has acquired and owns and holds a large amount of bonds, stocks, and securities in other corporations and concerns, which is in no way necessary or appropriate to the purposes of the railway company, and was acquired by transactions beyond the powers conferred by its charter, the value of which is alleged to be $70,000,000.

This statement presents a fair outline of plaintiff's cause of action, as stated and set forth in the complaint. The relief demanded is that the Superior Company and the trustees be required to restore to the railway company the property held by them, that the same, together with the other property, stocks, bonds, and securities, now possessed by the railway company, which it had no lawful right to acquire, be sold under direction of the court, and the proceeds distributed among the several stockholders.

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The only questions presented are: (1) Whether several causes of action are improperly united in the complaint; (2) whether the complaint states facts constituting a cause of action.

1. Taking the complaint as a whole, and viewing the allegations thereof in the light of the evident purpose of the pleader, we are clear that several causes of action are not improperly joined, and that the demurrer upon that ground was properly overruled. The contention of defendants that the claim to a restoration of the property in the hands of the Superior Company constitutes one cause of action, and the claim to a restoration of that transferred to the trustees constitutes another and different right, is not sustained. Nor do the allegations of the ninety-ninth paragraph of the complaint [1] present a cause of action in any essential respect differing from the preceding allegations. The whole scheme of the pleading, and this seems the predominating thought, is to compel by decree of court the sale of property owned by the railway company, which it has acquired in violation of law and its charter powers, and has no authority to hold or control, and that the proceeds thereof be divided among the several stockholders of the company. It does not matter that part of the property so sought to be reached is held by one and a part by another of the defendants, or that a part thereof is now in the possession and control of the company. All the defendants are concerned in the main purposes of the litigation, and it is not material that they are not all affected alike. The principal relief demanded is for a recovery of the property, that it may be disposed of for the benefit of those entitled to it. One general right is demanded, and it is not fatal that defendants are in a measure separately or independently involved. State v. Knife Falls Boom Co. 96 Minn. 194, 104 N. W. 817; Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166, 133 Am. St. 451; Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425.

2. Does the complaint state a cause of action? The question must

[1] [That defendant railway company had acquired other securities of various corporations which it had no authority under its charter to own or hold, some of which it had purchased of defendant J. J. Hill at prices in excess of their real value. Reporter.]

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be answered in the affirmative. The rule guiding the court in determining the sufficiency of a complaint, either in an action at law or suit in equity, when challenged by a general demurrer, is not to determine whether the plaintiff is entitled to all and singular the relief demanded or prayed for, but whether the allegations thereof, properly and liberally construed, entitle him in any measure to the relief demanded. If so, the demurrer will be overruled. 2 Dunnell, Minn. Digest, § 7549, and cases there cited. The rule is one of sound policy, and serves to obviate the embarrassment with which courts are often confronted by decisions attempting, upon demurrer, to cover the entire scope of the litigation, with only a partial or one-sided statement of facts before them. Every case is controlled by its particular facts, and until they are presented no final determination of the rights and liabilities of the parties can intelligently be made. We follow and apply the rule in this case, and come directly to the question whether the complaint states facts entitling plaintiff to any particular relief.

The theory of plaintiff's case, as heretofore stated, is that all the property here in question, namely, that turned over to the Superior Company, the part thereof which that company transferred to the trustees, as well as the property now in the hands of the railway company and referred to in paragraph 99 of the complaint, was acquired by the railway company as the result of transactions beyond its powers as conferred by its charter, and wholly foreign to the legitimate purposes of the corporation, and that it has no right to retain the same, and therefore that a sale thereof should be ordered by the court for the benefit of the stockholders. It is unnecessary, and we deem it inadvisable, to attempt to determine the extent of the power and authority of the railway company in respect to the investment of its surplus funds in the class of securities and properties here claimed to have been unlawfully acquired, or the question whether plaintiff is or may be entitled to a decree for the sale of the same for the benefit of the stockholders. The complaint may be sustained without regard to either question.

A vast amount of property is involved in the action, a part of which is particularly described, and a part left uncertain; the pre-

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cise nature thereof not being disclosed. To attempt to say that the purchase or acquisition of the whole or any part of it was unauthorized would require an anticipation or assumption of the material facts, and result in a correct or an erroneous conclusion, according as the facts may subsequently be made to appear. For this, if for no other reason, the question should be deferred until the evidence comes in. We pass, therefore, without further mention, the contention of defendants that the right to invest in all classes or species of property was vested in the old Minnesota & Pacific Railroad Company, by the terms of its charter, and that the right so conferred passed to the Great Northern Company as its successor in interest. The fact remains, according to the allegations of the complaint, that all the property here involved was acquired with the money of the railway company, and if any part thereof has been wrongfully and unlawfully disposed of by the company a restoration thereof to its treasury may be compelled, irrespective of the question whether it was originally rightfully or wrongfully acquired. And we are not required to go further in this respect than to hold that a restoration may be had, leaving the question whether a sale of the same may be ordered to the trial court after the facts have been presented.

That a portion of the property has been wrongfully disposed of by the railway company there can be, on the facts alleged in the complaint, no serious question. Upon this feature of the case we concur with the learned trial court that the formation of the trust and the transfer of the iron ore properties to the trustees was illegal, and a violation of the rights of the nonassenting stockholders. That transfer was at the instance and pursuant to directions of the railway company, acting through its board of directors, and, though valid as to all stockholders who expressly or impliedly acquiesced therein, was not of binding force against those who did not assent. While the transfer was made by the Superior Company, the complaint makes it clear that it was the act of the railway company, for the Superior Company had no interest in the property, and held it subject to the orders of the railway company. Since the property was originally acquired with the money of the railway company, it was held by the company for the uses and purposes of the corporation and its stock-

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holders. The transfer to the trustees was without consideration, and all title and right of control thereby passed from the railway company, resulting in a loss to and a violation of the rights of the stockholders. The trustees were vested with the exclusive management of the property, and, though beneficial certificates were issued to the railway stockholders, no dividends were to be declared or to be paid thereon, except when the trustees deemed it proper. It requires no extended discussion to demonstrate the unlawfulness of the transaction as respects the stockholders who refused their assent to the transaction. Stockholders have the undoubted right to insist that the property of the corporation be devoted to corporate purposes, and to prevent, by appropriate proceedings, a dissipation thereof by gift or a disposition to purposes foreign to the affairs of the corporation.

Counsel for defendants do not seriously, if at all, controvert this proposition, but they do contend: (1) That all stockholders of the railway company must be deemed to have acquiesced in the transfer to the Superior Company, because not questiond for more than eight years thereafter, and that in any event plaintiff cannot question the same, since he became a stockholder long after the transaction had been fully consummated and completed; and (2) that since the trustees issued and delivered to the railway stockholders beneficial certificates in the trust, which were transferable on the market independently of the corporation stock, which they have accepted, they cannot now complain.

It is a sufficient answer to the first contention that no title or exclusive right of control ever passed to the Superior Company, and whatever of the property now remains in its hands belongs to and is under the control of the railway company. If, therefore, it shall appear on the trial of the action that plaintiff is entitled to a sale of the property for the benefit of the stockholders of the railway company, the fact of the colorable transfer to the Superior Company presents no obstacle in the way of a decree so directing. The property belongs to the railway company, and is simply held by this agency, created for the purpose. In this view of the case it becomes unnecessary to determine whether plaintiff, having acquired his stock subsequent to the transfer to the Superior Company, may attack the

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same. The question is not involved, for there never was a sale or parting with the title to that company. It may be said, however, that upon the suggested question the authorities are not in harmony. 2 Clark & Marshall, Private Corporations, 551. As to the transfer to the trustees the question is not involved, for plaintiff became a stockholder prior to that transaction.

In respect to the second contention, just referred to, namely, the issuance, delivery, and acceptance of the beneficial certificates, it is sufficient to say that the complaint does not present facts justifying the conclusion urged. It affirmatively alleges plaintiff's refusal to accept the certificates.

Our conclusion, therefore, upon this branch of the case is that the act of the railway company in vesting title to the iron properties in the trustees was illegal, and plaintiff is at least entitled to a decree for its restoration. Williams v. Johnson, 208 Mass. 544, 95 N. E. 90; Schwab v. Potter, 194 N. Y. 409, 87 N. E. 670. Whether he is entitled to any other or further relief we do not attempt to determine.

3. It is further contended by defendants that plaintiff cannot maintain the action, for the reason that no sufficient demand was made upon the railway company that the action be brought by its officers. This question requires no extended mention. The rights of minority stockholders are clearly defined by law; and where the corporation itself refuses to act, that a minority stockholder may maintain an action in behalf of himself and all other stockholders to protect their rights is equally well settled. The property sought to have restored to the railway company has been wrongfully diverted by the corporation, and we are clear that an action to compel such restoration may be maintained by a stockholder, when the corporation refuses to act. The complaint sufficiently alleged a refusal of the railway company, and defendants' objections to the complaint in this respect are not sustained.

Order affirmed.

BUNN, J., having made the order appealed from, took no part.

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STATE ex rel. GEORGE T. SIMPSON v. CITY OF MANKATO and Others.[1]

May 17, 1912.

Nos. 17,489—(13).

Constitution — powers of the state legislature.

The provisions of a state Constitution do not confer any powers upon the legislature, but are mere limitations, and the legislature has all the powers of an absolute sovereign of which it has not been deprived by the Constitution.

Constitutionality of statute.

In determining the constitutionality of an act of the legislature, every intendment must be indulged in favor of its validity.

Constitution — construction of its limitations.

Constitutional provisions being mere limitations, the question to be considered, in determining whether a particular act of the legislature violates a particular constitutional provision, is not whether the people, in adopting such provision, had in mind the act of the legislature in question, and were attempting to authorize it, but whether, having in mind the possibility of some future attempt on the part of the legislature to enact such an act, they were attempting to frustrate it in advance.

Same — distribution of powers — municipal government.

The requirement of Const. art. 4, § 36, that home rule charters must provide for a "mayor or chief magistrate, and a legislative body," does not of itself import such a severance of the several departments of municipal government as to preclude the legislature from authorizing cities and villages to adopt the commission form of government, wherein the mayor is vested with legislative functions and the council is given other than legislative powers.

Same.

Const. art. 3, providing that the powers of government shall be divided into executive, legislative, and judicial, etc., does not apply to municipal gov-

[1] Reported in 136 N. W. 264.

[Note] Constitutionality of commission form of government, see note in 35 L.R.A.(N.S.) 802.

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ernments; and neither its expressed intent nor its spirit can be read into Const. art. 4, § 36, so as to extend the limitation imposed by the latter on the form of municipal government, and thereby make it co-extensive with the limitation imposed by the former upon the form of state government.

Act constitutional.

Laws 1909, c. 170, authorizing cities and villages to adopt the commission form of government, *held* constitutional and valid.

Mankato city charter.

The Mankato city charter, which provides and establishes the commission form of government for the said city, is authorized by Laws 1909, c. 170, and does not transcend the constitutional limitations imposed upon the form of municipal government.

As attorney general of the state, George T. Simpson petitioned this court for a writ of quo warranto, directed to the city of Mankato, Charles T. Taylor, Ben Bangerter, Jr., Lawrence Henline, J. D. Hunniston and Robert Lamm. The respondents made return that they were duly elected and qualified officers of respondent city, duly acting as such officers, and discharging the duties of their respective offices. The reply admitted that respondents performed the duties required of them by the charter described in the petition, but denied they were performed by the sanction, acquiescence or approval of the state of Minnesota, or any of the people thereof. The court granted its writ. Writ quashed and respondents dismissed.

Lyndon A. Smith, Attorney General, *Alonzo J. Edgerton,* Assistant Attorney General, *C. L. Benedict* and *Arthur Schaub,* for relator.

C. O. Bailey, City Attorney, and *Lorin Cray,* for respondents.

Philip E. Brown, J.

This is a proceeding in the nature of quo warranto, on the relation of the attorney general, for the purpose of determining the constitutionality of the charter of the city of Mankato and the right of the other respondents to hold office thereunder. The admitted facts are as follows:

The city of Mankato has, for many years, been a municipal corpo-

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ration of this state. In January, 1909, the district court of Blue Earth county duly appointed freeholders to frame a charter for the said city, pursuant to section 36 of article 4 of the Constitution, and under sections 748–758, R. L. 1905, and chapter 170, p. 181, Laws 1909. On April 26, 1910, a proposed charter, framed by the said freeholders, was duly submitted to and adopted by the electors of the said city. In April, 1911, an election was held under such charter, and the respondent Taylor was elected mayor and the other individual respondents were elected councilmen, and each of them has since discharged the duties of such offices. The said charter provides, among other things:

"Sec. 4. Elective officers of the city shall be a mayor and four councilmen."

"Sec. 36. The mayor shall be the chief magistrate and executive officer of the city. He shall see that the laws of the state, the provisions of this charter, and the ordinances of the city are duly observed and enforced within the city. He shall be charged with the general oversight of the several departments of the municipal government and shall see that all contracts made with the city are faithfully performed."

"Sec. 41. The mayor shall be a member of the council, and have a right to vote upon all propositions, matters, and questions coming before it, but shall have no veto power."

"Sec. 43. The administrative powers, authority, and duties of the city officers, not otherwise provided for, shall be distributed among and assigned to five departments as follows:

1. Department of public health, sanitation, police and general welfare.

2. Department of accounts and finances.

3. Department of parks, public grounds, buildings and fire protection.

4. Department of water works and sewers.

5. Department of streets and alleys."

"Sec. 45. The mayor shall be superintendent of the department

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of public health, sanitation, police and general welfare, and the council shall, at the first regular meeting after the election of its members, designate by majority vote one councilman to be superintendent of accounts and finances; one to be superintendent of the department of parks, public grounds, buildings and fire protection; one to be superintendent of the department of waterworks and sewers; and one to be superintendent of the department of streets and alleys."

"Sec. 54. The council shall be the governing body of the municipality. It shall exercise the corporate power of the city, and, subject to the limitations of this charter, shall be vested with all powers of legislation in municipal affairs, adequate to a complete system of local government, consistent with the Constitution of the state."

"Sec. 96. After the acceptance by the council of any bid, it shall direct the execution of a contract by the proper officers, in accordance with the said plans and specifications and such contract shall be carried out by the proper department or officer of the city, as in this charter provided."

"In case the council shall determine that any commodities or service are to be procured in open market, the same shall be procured by the proper department or officer in accordance with such general directions as the council may give."

The relator contends that this charter does not comply with the provisions of section 36, article 4, of the state Constitution, and is void: (1) Because "the mayor, being the chief executive of the city, is made a member of the council, and is permitted to participate in all the legislative and other powers given to the council;" (2) because "the council, being the only legislative body provided for in said charter, contains also the mayor, the chief and only executive of the city provided thereby;" (3) because "the council of five members is given legislative, executive, and administrative duties and functions;" (4) because "the council is given other than purely legislative powers."

Section 36 of article 4 of the Constitution, above referred to, empowers cities and villages to frame charters for their own govern-

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ment "consistent with and subject to the laws of this state," and provides that "it shall be a feature of all such charters that there shall be provided, among other things, for a mayor or chief magistrate, and a legislative body of either one or two houses; if of two houses, at least one of them shall be elected by general vote of the electors." It further provides for the submission of such charter to the electors for ratification, and that before any city shall incorporate thereunder the legislature shall prescribe by law the general limits within which such charter shall be framed, but that such charter shall always be "in harmony with and subject to the Constitution and laws of the state." And finally it provides that "the legislature may provide general laws relating to affairs of cities * * * which * * * shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for."

Sections 748–758, R. L. 1905, provide the method of framing such charters by a board of freeholders and for their submission to the electors, and by Laws 1909, p. 181, c. 170, such board, when so appointed, are authorized and empowered, in addition to other powers theretofore granted them, to incorporate as a part of the proposed charter for any city the commission form of city government. By sections 3 and 4 [p. 182] of the last-mentioned act it is provided that the board of freeholders may distribute the administrative powers, and may prescribe the duties of the officers and incorporate in such charter provisions defining the powers and duties of the mayor and each member of the council, and may provide that each member of the council shall perform such administrative duties as may be designated in such charter.

Upon these constitutional and statutory provisions the relator predicates his contention that the said charter is invalid. As reiterated by him, his contention is as follows: "Our contention is that by the words 'mayor or chief magistrate' is meant an official clothed with executive power, and executive power only, and that therefore a charter which clothes this official with both executive and legislative powers, and makes him a member of the legislative

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body, is not in accordance with the constitutional amendment cited. We also contend that by the words 'a legislative body of either one or two houses' is meant a body of officials who are endowed with legislative powers, and legislative powers only, and that therefore a charter which gives to such body both executive and legislative powers, and includes in its membership the chief executive of the city, is not in accordance with the provisions of the amendment. This, briefly stated, is our position, and the one question before this court for determination."

The relator has cited many authorities to support the proposition, propounded by Chief Justice Start in Cooke v. Iverson, 108 Minn. 388, 397, 122 N. W. 251, 254, that, "when the language of the Constitution is positive and free from all ambiguity, courts are not at liberty, by a resort to the refinements of legal learning, to restrict its obvious meaning." That this is the true canon of construction in applying constitutional provisions, cannot be doubted. We again declare, as was declared by the Chief Justice in Cooke v. Iverson, supra, that "we must accept the Constitution as it reads when its language is unambiguous, for it is the mandate of the sovereign power." But from this canon of constitutional construction we cannot slip so readily into the position into which the relator, seemingly unmindful of another great canon of the law, has slipped, and declare that, because of the constitutional requirement that the so-called home rule charters must provide for a "mayor or chief magistrate and a legislative body," the legislature, whose will, except as restricted by the Constitution, is equally the will of the people, may not authorize the freeholders of a city to invest their mayor or chief magistrate with power to participate in the deliberations of the local legislative body, and to give the latter the power to participate in the administrative functions of the city.

We must not forget that the voice of the legislature is the voice of the sovereign people, and that, subject only to such limitations as the people have seen fit to incorporate in their Constitution, the legislature is vested with the sovereign power of the people themselves. In other words, the provisions of a state Constitution do not

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and cannot confer upon the legislature any powers whatever, but are mere limitations in the strict sense of that term, and the legislature has all the powers of an absolute sovereign of which it has not been divested by the Constitution. State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498. See also 8 Cyc. 774, et seq.; Nitka v. Western Union, 149 Wis. 106, 135 N. W. 492; Eckerson v. City, 137 Iowa, 452, 115 N. W. 177; Attorney General v. Preston, 56 Mich. 177, 22 N. W. 261. In determining, therefore, the constitutionality of an act of the legislature, the canon of constitutional construction above recited must be applied, together with that other equally as sacred canon that every intendment must be indulged in favor of the constitutionality of an act of the legislature. State v. Corbett, supra; 3 Dunnell, Minn. Digest, § 8931.

"Furthermore," said Mitchell, J., in State v. Corbett, supra, at page 349, [59 N. W. 318, 24 L.R.A. 498], "courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the Constitution, or because it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the Constitution. Except where the Constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point out some constitutional limitation which the act clearly transcends." See also 3 Dunnell, Minn. Digest, § 8932.

The first and main question, then, for determination in this case, is, not whether the Constitution authorized the law of 1909, but whether such act contravenes any provision thereof. Assuming for the moment that such act authorizes the Mankato charter, does it transcend the constitutional requirement that such a charter must provide for a "mayor or chief magistrate, and a legislative body?" and is the said charter "in harmony with and subject to the Consti-

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tution?" Obviously, this involves the determination of the meaning of the terms "mayor or chief magistrate" and "legislative body." The relator first contends that the obvious meaning of these terms excludes the conception of any participation by one of the departments thus indicated in the functions of the other, and in support of this contention urges that this exclusive meaning of the terms must be held to have been contemplated when the said requirement was inserted in the Constitution, for the reason that such was the common acceptation of such terms at that time. To this contention and argument there are two replies which, to us, seem conclusive:

First, the question is, not whether the people, in adopting this provision, had in mind any such city charter provisions as those now under consideration and were endeavoring to make anticipatory provision therefor, but whether, having in mind the possibility of some future attempt thus to intermingle the functions of the executive and the legislative departments of municipal government, they were attempting in advance to frustrate any such attempt.

"Constitutions are not made for existing conditions only," said Mr. Justice Brown in Elwell v. Comstock, 99 Minn. 261, 265, 109 N. W. 698, 699, 7 L.R.A.(N.S.) 621, 9 An. Cas. 270, "nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."

Unless, therefore, it can be said that the constitutional limitation now under consideration was intended to exclude the mayor or chief magistrate of a home rule city or village from the deliberations of the legislative body thereof, and to prohibit the latter from exercising executive and administrative functions, the relator's contention cannot prevail, at least so far as it is based upon the obvious and unambiguous meaning of the terms used. We do not think that by the use of these terms such an intention is indicated with that clearness and particularity necessary to vitiate a solemn enactment of the legislature; for under the doctrine laid down by Brown, J., supra, the legislature, unless plainly restricted by the Constitution, had the

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right to place upon such terms an interpretation that "would meet the advancing and improving affairs of men."

Second, contrary to the relator's contention, and as pointed out in the respondents' brief, the legislature of this state, in granting charters to cities and villages from the time of the admission of the state in 1858 up to the year 1893, when the constitutional provision prohibiting special legislation was adopted, in many instances made the mayor or president of a city or village a member of the council or at least permitted him to vote in case of a tie; and even now under R. L. 1905, §§ 711–728, a village president is a member of the council, and he and the village trustees are constituted peace officers, and are given power to enact ordinances, etc. How, then, can it be said that the Constitution, in requiring that a city shall have a mayor or chief magistrate, plainly contemplates that such officer shall have executive powers only?

The relator contends that this argument does not extend to the matter of giving the legislative body administrative powers, asserting that none of the charters above referred to vest the council with any such powers. But this contention goes more to the weight of the analogy than to its pertinency, and when it appears that the term "mayor or chief magistrate," as used in the Constitution, did not, at the time of its insertion therein, necessarily import an officer vested with executive functions only, it is futile to urge that anyway the term "legislative body" was used in a technically exclusive sense; for the intention of the constitutional limitation to keep the several departments of municipal government separate and distinct, if such were the intention attempted to be expressed, would be as truly, though perhaps not as largely, violated by giving the mayor legislative powers as by also giving the council administrative powers. It is, furthermore, a matter of common knowledge that, when used in connection with municipal government, such terms as mayor, council, etc., are not used in their strictly technical sense as designating officers of exclusively executive and legislative functions respectively. See Eckerson v. City, 137 Iowa, 452, 115 N. W. 177; People v. Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. 498.

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In the latter case Campbell, C. J., delivering the opinion of the court says: "There can be no doubt that under the section in question the mayor is a member of the common council. City charters here, as in England, do not always agree as to the constituents of this body. In some cases there is a separate council, which is only one of the parts of the city legislature, and requiring the approval of another board, or of the mayor, acting separately, as the Governor does, to complete their action. But most of our cities in their earlier stages, if not permanently, have had a council where the mayor sits in person, and over whose action he has no veto. And in all such corporations he has been deemed a member as clearly as the alderman."

See also the cases cited herein in connection with the relator's next contention.

Since, therefore, it cannot be said that the terms used in the constitutional provision under consideration, either of themselves or when construed in the light of conditions prevailing when they were inserted in the Constitution, precluded the legislature from authorizing the provisions of the Mankato charter here attacked, we must seek some other reason, if any there be, why the said act of 1909 and the said charter are invalid. This reason the relator claims to find in article 3 of the Constitution—that "the powers of the government shall be divided into three distinct departments, the legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this Constitution." Upon this provision the relator based his principal argument; for, though explaining, in his reply brief, that he does not contend that this provision is directly applicable to municipal government, he nevertheless attempts to impress this provision upon such governments, if not directly, then through the medium of the said article 4, § 36.

We do not think that the relator's contentions here are well founded. Article 3 does not apply to municipal governments, and we do not see how it can be invoked for the purpose of explaining and

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thus extending the limitations imposed by article 4, § 36. In People v. Provines, 34 Cal. 520, a constitutional provision almost identical, even to the wording, with the one here invoked, was held to refer to the state government, as distinguished from municipal governments; Sanderson, J., in speaking of the reasons why the framers of the various American Constitutions adopted provisions of this character, saying at page 537: "The mischief, however, against which they sought to provide, did not come from inferior or subordinate officers, but from the higher grades, in whose hands the first and leading powers of the government were vested. So far as the former were concerned, they were sufficiently under the control of the latter. Abuse of power could not come from the former in such measure as to destroy or overthrow the liberties of the people, except by the direction or connivance of the latter. To surround the latter with checks was a sufficient protection against the former. Hence the framers of American Constitutions were content with checks upon the latter, leaving the former, as we consider, to be regulated by the legislative department."

In Santo v. State, 2 Iowa, 165, 220, 63 Am. Dec. 487, followed and approved in People v. Provines, supra, it was held that the same person could hold the offices of mayor and justice of peace; the court's reasoning being as follows: "The objection intended is, that the mayor is an executive officer, and that judicial authority is conferred upon him, in conflict with that provision of the Constitution which says that no person charged with the exercise of powers properly belonging to one of these departments—the executive, the legislative, or the judicial—shall exercise any functions appertaining to either of the others. These 'departments' are the departments of the government of the state of Iowa. The mayor of the city of Keokuk is not a part of the government of Iowa. He exercises none of the functions belonging to that department. Whatever executive offices he may perform pertain to him only as an officer of that corporation. But we do not mean to say that he is an executive officer in any proper sense. Similar provisions exist in the Constitutions of all, or nearly all, the other states, and yet from

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time immemorial similar powers have been conferred upon mayors of cities."

In Eckerson v. City, 137 Iowa, 452, 115 N. W. 177, a charter vesting all executive, legislative, and judicial powers in a council consisting of the mayor and four councilmen was upheld; the court expressly indicating that the objections urged were not worthy of extended consideration. In Bryan v. Voss, 143 Ky. 422, 136 S. W. 884, a charter provision similar to the Des Moines charter, attacked in the case last cited, was sustained as against a similar objection; Hobson, J., in delivering the opinion of the court, saying: "Under the city charters now in force, the city councils in cities of the second class exercise both legislative and executive functions, and this is true in a large per cent of the municipalities in the state, and has been so from the formation of the government. The Constitution vests the judicial power of the state in certain officers, and no others may exercise these powers. But it has not been the policy of the state to separate legislative from executive functions in its government of the municipalities. The city councils from time immemorial have had charge of the fiscal matters of the municipality, and they have at the same time exercised certain limited legislative functions." In State v. Ure, 91 Neb. —, 135 N. W. 224, a similar conclusion is reached with regard to a similar charter.

We think, therefore, that it is entirely clear that article 3 of the Constitution of Minnesota does not apply to municipal governments, and that neither its expressed intent nor spirit can be read into article 4, § 36, so as to extend the limitation thereby imposed upon the form of municipal government, and thereby make it coextensive with the limitation imposed by article 3 upon the form of state government. We hold, further, that the act of 1909 does not transcend the limitations imposed by article 4, § 36. It is our opinion that this provision merely prescribes the general frame for a home rule charter, and hence that it was competent for the legislature to leave to the freeholders' charter commission the matter of determining the details of the local government, within certain general limits, and, further, that the latter do not preclude such a distribution of the functions of the local government as is made by the Mankato charter.

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It may be well to note here, before leaving this branch of the case, that article 4, § 36, reserves to the legislature full control over home rule charters. The language, as recited above, is: "The legislature may provide general laws relating to affairs of cities * * * which * * * shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for." Does this not argue for a liberal construction of the other provisions of this section, and is it not enough to quiet the fears of those who may in spectral vision look upon the provisions of the Mankato charter as too radical a departure from the traditional form of municipal government? For if the municipalities, given this large measure of freedom, should go astray, has not this provision reserved to the legislature the power to reach out and bring them back into the path of institutional righteousness?

The only remaining question necessary to be determined in this case is whether the act of 1909 authorizes the Mankato charter, and we think it does. It is a broad grant of power to fix, within certain general limits, all the details of the local government. It furthermore expressly provides that the board of freeholders may distribute the administrative powers, and prescribe the duties of the officers, and may incorporate in the charter provisions defining the duties and powers of the mayor and each member of the council, and may provide that each member of the council shall perform such administrative duties as may be designated in such charter. The foregoing is, we think, precisely what has been done in the Mankato charter. Charters very similar to this one have been sustained in other states having Constitutions and laws very similar to ours. See Eckerson v. City, 137 Iowa, 452, 115 N. W. 177; Bryan v. Voss, 143 Ky. 422, 136 S. W. 884; Cole v. Dorr, 80 Kan. 251, 101 Pac. 1016, 22 L.R.A.(N.S.) 534. Furthermore, in State v. Ure, supra, it was held that such a charter, adopted pursuant to legislative authority, was valid, absolutely without any constitutional authorization whatever.

Writ quashed, and respondents dismissed.

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MARTHA GLEWWE v. ST. PAUL CITY RAILWAY COMPANY.[1]

May 17, 1912.

Nos. 17,513—(101).

Ejecting passenger — excessive damages.

Action to recover damages for wrongful ejection from a street car. *Held*, that an award of damages in the sum of $150 is excessive, and that a new trial be granted, unless the plaintiff consents to reduce the verdict to $100.

Action in the district court for Ramsey county to recover $400 actual damages and $100 exemplary damages, for wrongful ejection from a street car. The answer alleged that plaintiff boarded defendant's car and did not pay any fare. The reply admitted that plaintiff did not pay her fare but alleged that at two different times plaintiff's husband tendered sufficient fare to the conductor, who refused to take it. The case was tried before Finehout, J., and a jury which returned a verdict in favor of plaintiff for $150. From an order denying defendant's motion for a new trial, it appealed. Reversed, and new trial granted unless within fifteen days after the remittitur is filed plaintiff consent to a reduction of the verdict to $100, in which case the order is affirmed.

W. D. Dwyer, for appellant.

Converse & Grannis, for respondent.

PER CURIAM.

Action to recover damages, which the plaintiff claims to have sustained by reason of her wrongful ejection from a street car of the defendant upon which she was a passenger. Verdict for the plaintiff in the sum of $150. The defendant appealed from an order denying its motion for a new trial, and assigns as error that the dam-

[1] Reported in 136 N. W. 2.

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ages are excessive and appear to have been given under the influence of passion and prejudice.

The evidence on behalf of the plaintiff tended to establish these facts: On the afternoon of May 30, 1911, the plaintiff, accompanied by her husband, boarded the car at the corner of Market and Fourth streets, St. Paul, and occupied the same seat. When the conductor called for their fares, the husband handed him a ten-cent piece, which he refused to accept for the alleged reason that it was not money. After the car crossed Wabasha street, the conductor again demanded the fares of the husband, who then handed him another ten-cent piece, which was refused for the same reason by the conductor, who said to the husband that he had a regular collection of such money and was looking for free rides, and that he must leave the car, which was stopped at Minnesota street, and the conductor ordered the husband to get off the car. Thereupon the plaintiff and her husband left the car in compliance with the order. The conductor said nothing to the plaintiff; but the fair inference from the evidence is that she was included in the order to leave the car, and that she heard all that was said by the conductor. In answer to a question as to the effect of being ordered out of the car upon her, she testified that: "I was nervous and kinder ashamed of myself. It is not so easy to be ordered off of the car. I feel kind of ashamed, and all the people there looked at us as if we done something that wasn't right. We were willing to pay, but he wouldn't take it."

The evidence is practically undisputed that the dimes tendered for the fares were more or less worn, and that this was the reason why the conductor would not accept them. The evidence as to the condition of the dimes was conflicting, but the verdict establishes the fact that they were not so worn that they were not a legal tender. A consideration of the evidence has led us to the conclusion that the verdict is so excessive that there should be a new trial, unless the plaintiff consents to a reduction thereof to $100.

Ordered, that the order appealed from be reversed, and a new trial granted, unless the plaintiff, within fifteen days after a remittitur is filed in the municipal court, files her written consent that

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the verdict be reduced to $100, in which case the order stands affirmed and judgment may be entered on the verdict as reduced.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. EDWARD J. SCHURMEIER and Others.[1]

May 17, 1912.

Nos. 17,516—(115).

Claim against decedent—jurisdiction of Federal court.

Federal courts in equity have jurisdiction to establish the claim of a foreign creditor against the estate of a decedent by a decree to that effect. Such a decree, when a certified copy thereof is filed in the proper probate court, stands as a claim duly proven and allowed against the estate of the decedent. It is the duty of the personal representative of the decedent to pay the claim in the due course of administration, and no order of the probate court allowing the claim or directing its payment is necessary.

Complaint sufficient.

The complaint alleges facts sufficient to constitute a cause of action.

Action in the district court for Ramsey county against Edward J. Schurmeier, Hubert C. Schurmeier, Emma A. Miller, and The United States Fidelity & Guaranty Company, to recover $9,876.19 upon an executors' bond. From an order, Hallam, J., overruling their separate demurrers to the complaint, defendants appealed. Affirmed.

Harris Richardson and *Walter Richardson,* for appellants.

Markham & Sanborn, for respondent.

START, C. J.

This is an appeal from an order of the district court of the county of Ramsey, overruling the separate demurrers of the several

[1] Reported in 136 N. W. 1.

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defendants to the complaint, and involves the question whether the complaint alleges facts sufficient to constitute a cause of action as to each and all of the defendants. Such allegations, so far as here material, are to the effect following:

On July 16, 1900, John H. Schurmeier, then a resident of the county of Ramsey, died testate, and his will was admitted to probate on December 27, 1900, by the probate court of that county. Thereupon the three individual defendants were appointed executors of the will. They accepted the trust, and gave an executors' bond, as principals, with the other defendant as surety, in the sum of $30,000, conditioned for a faithful discharge of all the duties of their trust according to law. December 27, 1900, the probate court made an order limiting to six months the time for creditors to present their claims, directing the executors to pay such claims and settle the estate within one year from that date. On or about the third day of April, 1907, in a suit then duly pending since February 7, 1902, in the United States Circuit Court, District of Minnesota, Third Division, sitting as a court of equity, and wherein the plaintiff herein, a foreign corporation, was complainant, and the individual defendants herein, as executors of the last will of the testator, were defendants, who appeared therein and contested plaintiff's claim against the estate of the testator, a decree was duly had and entered by such court in favor of complainant, the plaintiff herein, and against such executors, and each of them, establishing plaintiff's claim against such estate, for the sum of $9,876.19. In and by such decree the court directed that a certified copy thereof be filed in the probate court of the county of Ramsey, and that the executors pay to the plaintiff the amount of their claim so established, out of the assets of the estate, in the usual course of administration, the same as other claims allowed against the estate. Thereafter, and on April 9, 1907, a duly certified copy of the judgment and decree was duly filed in and received and recorded by the probate court as a claim against the testator's estate, and ever since that time has remained therein as a part of the files and proceedings in the estate. The probate court allowed claims,

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other than plaintiff's, which, with legacies, have been paid. The executors have distributed the bulk of the estate, which amounted to more than the full amount of all claims proven, and have converted the assets of the estate to their own use, and neglected to pay the claim of the plaintiff. The estate is solvent, and the executors have received more than enough money therefrom to pay all proven claims.

Prior to the commencement of this action the plaintiff duly obtained from the probate court of the county of Ramsey an order allowing the plaintiff to bring suit against the principals and the surety on the bond of the executors.

It is urged in support of the demurrer that the claim of the plaintiff against the estate of the testator was not presented to the probate court within the time limited by its order, nor within one year and six months, the ultimate limitation, and that no claim can be made a charge upon the testator's estate unless presented within five years after his death. This must be conceded, unless the commencement of the action in the Federal circuit court was a presentation of the claim within the statutes of this state. If the action had not been commenced within one year and six months from the time when notice of the order limiting the time for presenting claims was given, and in any event before the final settlement of the estate and decree of distribution, it could not rightfully have been maintained. Security Trust Co. v. Black River National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. ed. 147; State v. Probate Court of Ramsey County, 84 Minn. 289, 87 N. W. 783. The action in the circuit court was commenced before the expiration of one year and six months, and while the settlement of the estate was pending.

The jurisdiction of Federal courts in equity to establish the claim of a foreign creditor against the estate of a decedent cannot be questioned, in view of the decisions of the Federal supreme court, and a decree establishing such a claim must be given full effect by state courts, although they may question its correctness. The decree of the circuit court establishing the plaintiff's claim in this

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case necessarily rests upon the proposition that the commencement of the action was a presentation of the claim within the statutes of this state. The circuit court so decided, and directed the executors to pay the claim in the usual course of administration of the estate. Schurmeier v. Connecticut Mut. Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107. This decree, even if it be erroneous, as the able dissenting opinion of Sanborn, J., indicates, binds the parties thereto, and must be given full effect. Ames v. Slater, 27 Minn. 70, 6 N. W. 418.

It is further urged by appellants in effect that the complaint does not state a cause of action, because it does not allege a formal adjudication of plaintiff's claim and an order of the probate court directing the payment of the claim. The decree establishing the claim left nothing to the discretion of the probate court; for, were it otherwise, the probate court could defeat or embarrass the enforcement of the decree. The plaintiff's claim, after the certified copy of the decree was filed in the probate court, was in legal effect one duly allowed against the estate and ordered to be paid. Berkey v. Judd, 27 Minn. 475, 8 N. W. 383. No order of the probate court for its payment was necessary. Johanson v. Hoff, 70 Minn. 140, 72 N. W. 965. If the allegations of the complaint are true, they show a default by the executors in the conditions of the bond, for which they and their surety are liable.

Order affirmed.

FREDERICK HIRSCH v. CITY OF ST. PAUL.[1]

May 17, 1912.

Nos. 17,520—(72).

Complaint construed.

Complaint construed to state a cause of action for consequential damages resulting to abutting property from the first establishing of a street grade,

[1] Reported in 136 N. W. 269.

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and does not necessarily involve defect in plan or negligence in execution thereof, nor is the cause of action based on a defect in a public work, or upon the negligence of any officer or agent of the city, so that service of notice of claim upon the city is a prerequisite to maintenance of an action.

Local assessment for grading street not a bar to this action.

The city charter of the city of St. Paul does not provide for assessment of damages resulting to abutting lots from the establishment of a street grade in the proceeding for assessing the cost of grading the street against benefited property; hence such proceeding *held* not a bar to an action to recover damages by the owner of abutting lots resulting from the grade established.

Waiver of damages.

It not appearing from the answer that the grade was established before plaintiff petitioned the defendant to grade the street, he cannot be held to have waived damages to his property resulting from the grade established, and it is unnecessary to determine whether, by petitioning after the grade is established, the property owner waives damages.

Action in the district court for Ramsey county to recover $2,000, damages caused by the grading of a street. From an order, Dickson, J., sustaining plaintiff's demurrer to the fifth, sixth and seventh paragraphs of the answer, defendant appealed. Affirmed.

O. H. O'Neill and *J. P. Kyle,* for appellant.

John J. Kirby and *J. C. Michael,* for respondent.

HOLT, J.

Plaintiff is the owner of a city lot abutting on Juliet Place, a street in the city of St. Paul. In 1909 and 1910 the city established a first grade and graded this street. Plaintiff now sues the city for damages, claiming that the value of the lot was diminished by placing the grade several feet above the level of the lot.

The city answered, and by way of defense alleged that, upon a petition signed by plaintiff and others for the grading of the street, it established the grade and graded the street; that the city was authorized to make assessments of benefits and damages on real estate affected by the making of local improvements, including grading of streets, and all damages resulting therefrom are to be paid for by an assessment upon property benefited thereby, and not

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otherwise. It is further alleged that an assessment under this authority was made against plaintiff's lot in the sum of $36 for benefits; that this was not paid; that application for judgment against the lot was duly made and rendered May 31, 1911, for $37.65; that the judgment is in full force; and the lot has been sold thereunder.

The answer also alleges as defensive matter that the city had carried through without objection or appeal a proceeding to condemn part of the lot abutting on the street as support and slope for the grade made, wherein $1 damages and $4.12 benefits had been assessed. Another defense is the allegation that no notice of claim for damages had been served on the city. From the order sustaining plaintiff's demurrer to these defenses, the city appeals.

The questions raised by the demurrer are: (1) Does the complaint state a cause of action? (2) Should the consequential damages resulting to plaintiff's lot from the grading of the street have been determined in the proceedings taken by the city to assess for benefits, or to condemn part of the lot for slope? (3) Is plaintiff estopped from claiming damages by having petitioned for the grading of the street?

A demurrer searches the first pleading, and on that principle appellant attacks the complaint.

One of the reasons urged against the sufficiency of the complaint is the same one raised by the demurrer to one of the defenses pleaded, namely, the necessity of giving notice to the city of the claim before suit. If such notice is a prerequisite, the complaint should have alleged that it had been given; but, if not, the averment in the answer of want of such notice is no defense. To determine this question it is necessary to consider the cause of action set out in the complaint.

We do not think it is one necessarily based on negligence, but that the gist of the action is for damages to the premises of plaintiff consequent upon the establishment of a street grade and the construction of the street in accordance therewith. It states a cause of action for consequential damages to plaintiff's lot, because the

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grade of the street is so fixed and constructed that access thereto from the lot is rendered difficult, and the appearance and use of plaintiff's property impaired. The allegation that the grade was unreasonable, and could have been made without much, if any, damage to the property, and that the result of the grade will be to throw surface water on plaintiff's premises, all goes to the aggravation of the damages, and should not be considered as the basis of the action, which is found in these words: "That by the grading of said street, as aforesaid, a fill was made in front of plaintiff's premises, raising the surface of said street to a height of about six and one-half feet above the level of said above-described lot, thus leaving said lot and the house thereon below the street level six and one-half feet."

"Private property shall not be damaged for public use without just compensation" is a constitutional guarantee. That this applies to the damages resulting from the first establishment of the grade of a city street is settled in the case of Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884, 13 L.R.A.(N.S.) 790, 120 Am. St. 635. The grade so established may be the only one feasible, and the street properly graded in accordance therewith, and yet damage result to abutting lots. If so, we fail to see how the claim for such damages comes within this charter provision requiring notice to be given to the city before a suit will lie [Sec. 690] which reads: "Before the city of St. Paul shall be liable to any person for damages for, or on account of, any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk, park, public ground, ferry boat, or public works of any kind in said city, or by reason of any alleged negligence of any officer, agent, servant or employee of said city, the person so alleged to be injured shall give," etc.

Other reasons might be given why the charter provision, requiring notice of claims to the city before suit, is not applicable to actions like the present, but it is sufficient to say that, as we construe the complaint, the real basis of the legal claim asserted is neither a defect in the public work, nor the negligence of the city or any of its representatives.

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The charter provision of the city of St. Paul is somewhat different from that of the city of Seattle, so that the cases of Scurry v. City, 8 Wash. 278, 36 Pac. 145, and Postel v. City, 41 Wash. 432, 83 Pac. 1025, are not strictly in point, even were we inclined to follow the reasoning of the court therein. Construing the complaint as stating a cause of action for damages resulting to property from the opening of a street in front thereof upon a certain grade, it states a cause of action, and it is not necessary to determine whether the damages flow from a defective plan, or from its negligent execution, because, as above stated, neither may be involved, and still plaintiff be entitled to recover.

That the proceeding by which support of the slopes of the street as constructed was obtained from plaintiff's lot by condemnation was not one wherein he could have had determined the consequential damages arising from the establishment of the street grade and construction of the street seems reasonably clear. The taking of an easement for a slope for the street was separate, apart, and subsequent to the establishment of the grade from which the damages sued for flow, and could only involve additional damages to the lot.

But the attorney for the defendant contends that the establishment of the grade and construction of the street was a public improvement, which the city was authorized to do, and in the doing of which the damages, costs, and expenses were to be ascertained and assessed against property benefited. Therefore plaintiff had his exclusive remedy, in the proceeding to assess benefits for grading the street, to obtain the damages sought by the present action. If a remedy is given plaintiff in the charter to obtain these damages in proceedings to assess benefits for grading the street, we may concede, without deciding, that the defendant's contention is true. But we have been referred to no charter provision under which plaintiff may have his damages determined.

Section 238 prohibits the common council from making any improvement, unless in their opinion the real estate to be assessed therefor can be found benefited to the extent of the damages, costs, and expenses necessary to be incurred thereby. Grading a street

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is an improvement. However, upon examining the procedure to determine the benefits, we find that the only thing for which benefits may be assessed against property is the contract price for doing the grading plus the necessary expense of making the assessment.

Section 256 of defendant's charter shows this to be so. It reads: "Whenever any order shall be finally passed by the common council of said city as heretofore provided for filling, grading * * * or," etc., "the city clerk shall transmit a copy of such order of said council to said board of public works. The said board of public works shall cause the said work to be let and done as hereinafter provided; and after the whole of said work shall have been placed under contract, as hereafter provided, the said board shall thereupon proceed without delay to assess the amount, as nearly as they can ascertain the same, which will be required to defray the cost of such improvement, including the necessary expense of making such assessment, in proportion, as nearly as may be, to the benefit resulting thereto, in the manner hereinafter provided."

There being no provision under the charter under which plaintiff could obtain the redress he now seeks, we are of opinion that the proceedings to assess benefits and condemn for slope in grading the street set up as defenses to this action are of no avail. McCarthy v. City of St. Paul, 22 Minn. 527.

We need not determine whether, in an action of this kind, plaintiff, by petitioning the city to have the street graded, waives all claims for consequential damages to his property, for the reason that the defendant, in possession of knowledge as to the time the petition was presented and the grades established, has not alleged that the petition for grading the street was made upon a grade then established. For aught that appears, the adoption of a grade which damaged plaintiff's property took place after the petition was presented. In such event no good reason could be suggested for holding that plaintiff, by signing the petition, surrendered a claim the future existence or extent of which he could not then know.

Order affirmed.

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VILINDA BLAKELY v. WILLIAM BLAKELY.[1]

May 17, 1912.

Nos. 17,532—(93).

Divorce — attorney's fees — suit money.

An allowance to the wife, in a divorce action, for suit money and attorney's fees, must be made to her; but the court, in its discretion, may direct that it be paid to her attorney for her. Any allowance for her support should be paid directly to her, unless, in exceptional cases, the court deems it advisable, for her convenience or protection, to direct its payment to a third party for her. Allowance for attorney's fees and suit money *held* excessive.

Action in the district court for Hennepin county for an absolute divorce; for the care and custody of the child, and for temporary and permanent alimony and expenses of action. The answer admitted the marriage and the existence of the child named, but denied the other allegations of the complaint. Plaintiff, upon the complaint and answer and her affidavit, moved for an order directing defendant to pay $50 weekly, or $200 monthly, for her support, the sum of $600 to defray expenses of preparation and trial of case, and $600 attorney's fees. The motion was heard by John Day Smith, J., who ordered defendant to pay plaintiff's attorney $150 as suit money, $300 as attorney's fees, and $160 per month as temporary alimony. From the order awarding suit money, attorney's fees and temporary alimony, defendant appealed. Modified.

Chester McKusick, for appellant.

Henry Funkley, for respondent.

START, C. J.

Action for divorce. Upon a motion made on behalf of the plain-

[1] Reported in 136 N. W. 3.

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tiff herein, the district court of the county of Hennepin, on November 7, 1911, made this order:

"It is ordered that defendant, within thirty days from the date of filing of this order, pay to the plaintiff's attorney the sum of $150, as and for suit money, and the further sum of $300, as and for attorney's fees, in said action, without prejudice to the right of the plaintiff to make further application for suit money and attorney's fees.

It is further ordered that defendant pay to the plaintiff's attorney, as and for temporary alimony for the plaintiff, the sum of $160 per month, payable monthly in advance, until the further order of court."

The defendant appealed from the order, and here urges that the order is erroneous, because it is, so far as it provides for the payment of suit money and attorney's fees, one for the benefit of the attorney, and deprives the plaintiff of any control of the amount directed to be paid.

All allowances to the wife, in a divorce action, for suit money and attorney's fees, must be made to her; but the court, in its discretion, may direct such allowance to be paid to her attorney for her. Any allowance for her support pending the action should be ordered paid directly to her, unless, in exceptional cases, the court, for her convenience or protection, deems it advisable to direct payment to be made to a third party for her.

It is further urged that the amounts allowed by the court for suit money and temporary attorney's fees are so excessive as to amount to an abuse of discretion. The allowance of large sums for attorney's fees and suit money upon the commencement of a divorce action, before the court can be advised as to its merits, has a demoralizing tendency; hence such allowances should be conservative, until the court is fully advised in the premises. Upon a consideration of the whole record, we are of the opinion that an allowance of $50 for suit money and $150 for attorney's fees, with the right to apply for further allowances as the merits of the case might justify, is all that the trial court ought, in the exercise of a sound discretion, to have allowed.

It follows that the order appealed from must be modified, as of

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the date of the original, so as to read as follows: Ordered, that the plaintiff be and is hereby allowed, and the defendant directed to pay to her attorney for her, within thirty days from the date hereof, $50 for suit money and $150 for attorney's fees, with the right to apply for such further allowances, if any, as the necessities and merits of the case may justify, and that the defendant pay to the plaintiff, for her support pending this action, $160 each month in advance until the further order of the court.

BERT W. FORBES v. JOHN STREAM and Others.[1]

May 17, 1912.

Nos. 17,534—(96).

Taxes — unassigned and unredeemed land bid in by the state.

Where land has been bid in for the state upon a delinquent tax judgment sale, such land, as long as it has not been assigned by the state or redeemed, is not to be placed on the delinquent tax list for judgment and sale for subsequent delinquent taxes; and the presumption is that the officials followed the law in this regard till the contrary clearly appears.

Redemption from sale.

The evidence examined, and *held* to sustain the findings of the trial court that the amounts required to redeem from a tax sale were correctly stated in the notice of redemption.

Action in the district court for St. Louis county to determine adverse claims to certain vacant land. The answer admitted that at the commencement of the action the land was vacant and unoccupied; denied that plaintiff was the owner thereof, but alleged that on April 8, 1905, John Stream died intestate; that on October 5, 1909, in proceedings then pending in the probate court of St. Louis county defendant Ellefsen was appointed administrator of the es-

[1] Reported in 136 N. W. 304.

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tate, that defendants Winters, Naomi X. Stream and Esther S. Stream were the only heirs at law of John Stream, and that each was entitled to an undivided one-third interest in the land. The reply was a general denial. The case was tried before Dancer, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff. From the judgment so entered, Signa L. Stream Winters, Naomi X. Stream and Esther S. Stream appealed. Affirmed.

W. G. Bonham, for appellants.

John A. Keyes, for respondent.

Holt, J.

The action is brought against defendants to determine adverse claims to an undivided one-half interest and estate in forty acres of land in St. Louis county. Plaintiff had judgment and defendants appealed.

The title of plaintiff is derived through a sale of the land for taxes. If this title is not good, the defendant heirs of John Stream are the owners. At a sale held May 13, 1907, pursuant to a real estate tax judgment entered March 21, 1907, in proceedings to enforce payment of taxes delinquent for the year 1905 in St. Louis county, the land in controversy was bid in for the state for $1.63. On July 2, 1909, the county auditor duly issued and delivered a state assignment certificate thereof to plaintiff's assignor upon the payment of $5.84, therein stated to be the amount for which the land was bid in at the sale, and all subsequent delinquent taxes, penalties, and costs. On May 16, 1910, the assignor paid $2.60 for the delinquent taxes, penalties, and costs for the year 1908. May 18, 1910, the county auditor issued the sixty day notice required by law to eliminate the right of redemption. The notice was served by publication, the land being unoccupied. The notice stated that the amount required to redeem, exclusive of costs to accrue upon the notice, was $5.84 and interest at twelve per cent from June 2, 1909, and $2.60 and interest at twelve per cent from May 16, 1910. The only objection raised to the validity of plaintiff's title is that the amount for which the state assigned the certificate of sale was

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eighteen cents less than it should have been, and the amount paid for the 1908 year's taxes, penalties, and costs should have been $2.73, instead of $2.60. Plaintiff claims the amounts paid were strictly accurate.

That plaintiff's assignor paid the proper amount for the certificate of assignment, we think, is without doubt true. To prove that it was not so, defendants offered in evidence a judgment, dated March 18, 1908, for the 1906 tax, amounting to $1.78. This included thirty cents for clerk's fees for advertising. Plaintiff claims that this judgment relates to the undivided half owned by the Vail Realty Company, and we think this contention must be upheld.

When the law (section 1579, G. S. 1894) provided that a list, which "shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent," should be filed in the office of the clerk of the district court to serve as a complaint in the tax proceeding, it was held in Berglund v. Graves, 72 Minn. 148, 75 N. W. 118, that after the state has once bid in the property at a tax sale it is not obliged to obtain a tax judgment and sell for the delinquent taxes for each subsequent year; but, on the other hand, the state might, if so disposed, proceed to judgment and sell, as held in Countryman v. Wasson, 78 Minn. 244, 80 N. W. 973, 81 N. W. 213.

The difficulties encountered in the enforcement of tax proceedings, where a choice of two courses was thus left to the state, appear in State v. Camp, 79 Minn. 343, 82 N. W. 645, decided in 1900. Evidently, as a remedy, the legislature in the extra session of 1902, by section 3 of chapter 2 of the laws of that session, provided that from the list of lands against which were delinquent taxes filed with the clerk should be excepted the description of such pieces or tracts of land as "shall have theretofore been bid in by the state and not assigned by it or redeemed," etc. This provision is retained in R. L. 1905, § 905.

The presumption is that public servants perform their duties in the manner prescribed by law. The law directed the officials to omit from the delinquent tax list serving as the basis for a tax judg-

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ment for the year 1908 the undivided half here in controversy. On the assumption that this was done, we take the amount for which the land was bid in by the state, the delinquent taxes for 1906 and 1907, the penalties thereon and the interest on these several sums, and the total is $5.84, the amount paid by the purchaser for the state certificate of assignment. By the introduction in evidence of the judgment entered March 18, 1908, for failure to pay the tax upon an undivided half of the forty acre tract, defendants claim to have proven that the clerk's fees of thirty cents for advertising should have been added. We are unable to say this is true, in view of the statute above quoted, which required the official to omit the undivided half bid in by the state at the prior sale and not assigned or redeemed from the tax lists.

The inference is warranted that the judgment related to the undivided half owned by the Vail Realty Company, notwithstanding the admission that it had at all times paid the taxes on its undivided one-half. Taxes may be paid as well after judgment and sale as before. The return is not such that we can say that the trial court erred when concluding that the true amount required to obtain the state assignment was $5.84, the amount stated in the notice, because, where two parties own an undivided half each of a tract of land, the proceedings relating to assessment and enforcement of the taxes should be fully shown as to the whole tract; otherwise, uncertainty results.

Nor do we think the appellant has shown that the amount paid for taxes delinquent subsequent to the assignment is incorrect. It was necessary for plaintiff to prove payment of such, if any there were, at the time the notice for redemption was issued. He did so by offering a receipt showing $2.60 paid by plaintiff's assignor on May 16, 1910. The auditor certified that this amount was in full for the redemption of the undivided one-half of the land from taxes, costs, interest and penalty for 1908 year's tax, and is in this form:

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STATEMENT OF TAXES DELINQUENT OR SOLD TO STATE

Auditor's Office, St. Louis County, Minn. May 16th, 1910

Receipt No. 16,973
Collect 2 60
Amt. of Remit 2 60

I hereby certify that there is now due the sum of Two 60-100 Dollars, in full for the redemption of the following described property from taxes, costs, interest and penalty for the years below stated.

Paid as subsequent Tax Judgment of 1907.
—J. J.

APPORTIONMENT ONLY													
City Village or Town	Sch. Dist. No.	Year	Assmt. Roll No.	Amts.	Totals	DESCRIPTION	Sec. or Lot	Town or Block	Range	Year	Amt. Tax or Judgt.	Cost, Penalty or Interest	Total
Morse	12	1908 C & A P & I		2 12 30 18	2 60	Und ½ of NE of NW	25	68	12	1908	2 12 2 59	.01	2 60

Received Payment in full of George Brousseau.

W. A. HOLGATE, County Treasurer. O. HALDEN, County Auditor.

May 16, 1910

[On Back]
MAY APPORTIONMENT
Treasurer's Settlement,
May 16, 1910.

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The only doubt cast upon the correctness of the auditor's certificate that $2.60 is the correct amount arises from the abbreviations and figures found under that part of the receipt denominated "Apportionment Only," viz: "C & A 30" "P & I 18."

By section 887, R. L. 1905, as amended by chapter 239 of Laws of 1905 [R. L. Supp. 1909, § 887—1], the auditor is required to apportion the penalties, costs, and interest received upon collection of real estate taxes between the county revenue fund and the school districts. Whether the money received is correctly distributed has, of course, no bearing on the redemption made or the amount thereof. But it is argued that the apportionment indicates that eighteen cents distributed for "P & I," which is claimed to stand for "Penalties and Interest," is too small, on the assumption that the tax was $2.12, that, therefore, the fifteen per cent penalty, amounting to thirty-two cents, was not paid, except eighteen cents thereof.

It is unfortunate that the return does not contain the judgment for the 1908 tax, which was undoubtedly entered when plaintiff paid the $2.60, as this would have settled beyond dispute what the correct amount was. Defendants, however, introduced evidence showing that the forty acres were assessed as a whole; the undivided interests not being kept separate. Assuming, then, that the tax was $4.24, the penalty would be sixty-four cents, the clerk's fees thirty cents, making a total of $5.18, an undivided one-half of which is $2.59, and interest, which is computed at one cent, would make $2.60, the amount paid and certified to be correct by the auditor. The so-called apportionment on the receipt is not such that the apparently incorrect figures thereon and abbreviations, unexplained, should overthrow the certificate that $2.60 was the true amount, especially since it can be demonstrated that this amount is correct, if the whole, and not the undivided half, went to judgment. We are not prepared to say that the trial court was not warranted, upon the evidence submitted, in finding that the true amount required to redeem the plaintiff's undivided half of the land from the tax of 1908 was $2.60.

The result is that the judgment is affirmed.

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FRED H. MURRAY v. WALTER J. SMITH and Others.[1]

May 17, 1912.

Nos. 17,719—(233).

State rural highway act valid.

Chapter 254, Laws 1911, providing for the establishment and maintenance of highways outside of cities and villages, and for the assessment of one-fourth the cost thereof on land specially benefited, is valid, under section 1, article 9, of the state Constitution, which requires taxes to be uniform upon the same class of subjects, but permits the legislature to authorize municipal corporations to lay and collect assessments for local improvements upon property benefited thereby, without regard to cash valuation.

Petition to the district court for Ramsey county for an injunction perpetually restraining defendants as state officers from paying out funds of the state in constructing a certain rural highway under the provisions of Laws 1911, c. 254. From an order, Olin B. Lewis, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

Thomas McDermott, for appellant.

Lyndon A. Smith, Attorney General, and *William J. Stevenson,* Assistant Attorney General, for respondents.

BUNN, J.

This action was brought by plaintiff, a taxpayer, to enjoin defendants, as state officers, from paying out funds of the state in constructing a rural highway in Pennington county under the provisions of chapter 254, p. 352, Laws 1911. A demurrer to the complaint was sustained, and plaintiff appealed.

The sole question involved is the constitutionality of the law under which defendants propose to pay the money of the state in aid of the construction of the highway. The only feature of the law that is

[1] Reported in 136 N. W. 5.

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assailed is that providing for the assessment of lands benefited by the highway for one-fourth of the cost thereof.

Section 1 of chapter 254 provides for the construction or improvement of highways by county boards, to be known as "state rural highways," upon the approval of a petition for the same by the county board and the state highway commission, and that "the expense therefor shall be borne one-fourth by local assessment, one-fourth by the county, and one-half by the state."

Section 2 provides that such highways shall be constructed or improved by a procedure identical with the proceeding prescribed by sections 3 to 52, inclusive, of chapter 230, [pp. 305–337] Laws 1905 [R. L. Supp. 1909, §§ 2651—45 to 2651—95], the drainage law, so far as the same may be made applicable to the construction or improvement of highways, to the raising of money therefor, and to the assessment of benefits, one-fourth only of the cost of "state rural highways" to be met by assessment. These sections of the drainage law, in so far as applicable, are made a part of this act.

By turning to these provisions in chapter 230, Laws 1905, we find that the county board can act only upon a petition signed by six or more of the landowners whose land is liable to be assessed for the highway, setting forth the necessity thereof and that it will be of public benefit or promote the public health. The county board must approve the petition, as must the state highway commission. The assessment district is not limited, but the viewers determine the amount of benefits to the lands, to the aggregate of not more than one-fourth of the cost of the highway. Their report is made to the board, and after notice and hearing it rests with the board to determine whether the benefits have been duly assessed, and to confirm the report and to establish the highway. The assessments are payable in ten annual equal instalments, with six per cent interest. An appeal lies to the district court.

We have stated so much of the law for the purpose of making clear the precise question involved, and to show that the rights of landowners are well safeguarded.

Does the fact that one-fourth of the cost of the highway is

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assessed upon lands deemed specially benefited make the law in violation of section 1 of article 9 of the Constitution of this state, which provides that taxes shall be uniform upon the same class of subjects. "* * * provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon * * * property benefited * * * without regard to a cash valuation?" We have held that counties are municipal corporations, within the meaning of the constitutional provision, for the purpose of levying and collecting the assessments provided for by drainage laws. Dowlan v. County of Sibley, 36 Minn. 430, 31 N. W. 517; Lien v. Board of Commrs. of Norman County, 80 Minn. 58, 82 N. W. 1094; McGee v. Board of Commrs. of Hennepin County, 84 Minn. 472, 88 N. W. 6. There is no difficulty in extending this ruling to the present case.

The crucial question here is whether a rural highway is or may be a special benefit to neighboring lands, as distinguished from a general benefit to the public. Plaintiff relies upon Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L.R.A. 757, 81 Am. St. 261, as answering this question conclusively in the negative. The law held unconstitutional in the Sperry case was clearly vicious. The entire cost of the highway was assessed upon lands within the prescribed limit of one mile on either side, whether the costs exceeded the benefits or not. The present law assesses one-fourth of the cost upon lands deemed specially benefited, without defining the limits of the assessment district. The 1895 law worked a great hardship upon the farmers of the state; it might easily be confiscatory. The present law is not burdensome; but one-fourth of the costs is assessed, and that is payable in ten instalments. We have no hesitation in saying that the law under attack in this case is meritorious, and that it should be sustained, unless it is entirely clear that lands outside of cities and villages can receive no special benefit by the construction and maintenance of good roads.

Though Sperry v. Flygare dealt with a statute vitally different from the one before us, though particular stress is in that case laid on the fact that the law imposed the entire cost on adjoining lands,

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without regard to the lands benefited by the highway, yet it may well be considered as authority for the proposition that rural highways are not local improvements. This is perfectly true in the sense that lands bordering on the highway are not benefited in the way lots bordering on a city street are benefited. It is not the fact that the road is in front of or along the border of the farm which creates the special benefit, but the fact that the farmer is given a good road to use in going to and from his markets. But we do not consider the Sperry case controlling on the proposition that lands tributary to a rural highway may not receive a special benefit therefrom different in character and extent from the benefit received by the public. The land of the farmer who is given a good road to market, where before he had a poor one, is certainly enhanced in value by the improvement. So is the land of every other owner who is thus given easy access to the cities or towns where he sells his produce and makes his purchases. The general public receive a benefit wholly different in character. The benefit to the motorist of the cities in having good roads for his pleasure runs is an example of the general benefit. Lands not in the territory reached by the highway, and whose owners cannot use it, receive no special benefit.

The law in question does not attempt to say what lands are benefited, but leaves the determination of the district, as well as the distribution of the assessment, to the viewers, and ultimately to the court. It is right that lands tributary to the highway should pay a part of the cost thereof, over and above what the public pays, for they receive a benefit over and above what the general public receives. The principles applied to the spreading of assessments for parks, for paving city streets, or laying sidewalks would be entirely erroneous, if applied to fixing the district or spreading the assessment for rural highways. But this is a question that does not concern the validity of the law, but rather the validity of the action that the viewers and the board of county commissioners may take in the matter. If they proceed upon an erroneous principle, or make a demonstrable mistake of fact, there is a remedy by appeal.

It is twelve years since the decision in Sperry v. Flygare. The

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Constitution has been amended. The value of good roads is better understood. The farmer now has his automobile, his traction engines, and his telephone. He has all the facilities for reaching the best markets at the right time, except the good road. We think it can fairly be said that the establishment and maintenance of a rural highway, that gives the owner of land easy and convenient access to his markets, enhances the value of his land and constitutes a special benefit, different in character from the public or general benefit.

It is true that at no time have farm lands been assessed for roads, except that, in assessing damages, benefits to the land have been deducted from the amount awarded to the landowner. This is a recognition of the fact that a highway may be a special benefit to land outside of cities and villages. See Swenson v. Board of Suprs. of Town of Hallock, 95 Minn. 163, 103 N. W. 895, quoting with approval Trinity College v. City of Hartford, 32 Conn. 452. It would seem that, if there are local benefits that can be set off against the damages awarded to a landowner by the establishment of a highway, the same local benefits are sufficient to warrant an assessment.

The weight of authority to-day seems to be to the effect that a highway may be a local improvement, and that an assessment of lands specially benefited may be sustained. Page & Jones, Taxation by Assessment, § 322; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; Law v. Madison, 30 Ind. 77; Board v. Harrell, 147 Ind. 500, 46 N. E. 124; Spaulding v. Mott, 167 Ind. 58, 76 N. E. 620; Jones v. Town, 158 N. Y. 438, 53 N. E. 280; Seanor v. County, 13 Wash. 48, 42 Pac. 552.

The case of Graham v. Conger, 85 Ky. 582, 4 S. W. 327, is opposed to this view, and the Washington Ave. Case, 69 Pa. St. 352, 8 Am. Rep. 255, seemingly so, though in the Pennsylvania case the real vice was charging the cost of the highway at a fixed sum per acre against adjacent lands, which the court held was so obviously unreasonable and erroneous as not to constitute on any fair principle of reasoning a valuation according to benefits. This may properly be said of any law that attempts to impose a front-foot

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assessment on lands adjacent to the highway, or that attempts to say that only farms that border on the road are specially benefited by it. This was practically the vice in the 1895 law. Lands that do not border on the highway, even though they are quite distant therefrom, receive a special benefit, if the owner has access to the highway, and can use it to go to and from his market.

We do not think the law can be upheld on the ground that the construction of a particular highway may involve drainage features. We place our decision on the ground that a public rural highway is or may be a special benefit to lands in the territory tributary to the same, as distinguished from the general benefit accruing to the general public. We hold that the provision of the act assessing one-fourth of the cost of the highway upon lands specially benefited is not obnoxious to article 9, § 1, of the Constitution.

Order affirmed.

PETER L. ZETTERBERG and Another v. GREAT NORTHERN RAILWAY COMPANY.[1]

May 24, 1912.

Nos. 17,496—(90).

Carrier — failure to furnish cars to shipper.

Failure of the plaintiff, in an action for damages against a railroad company for failure to furnish cars, to allege an express contract for such cars, does not bring the case within the operation of Laws 1907, c. 23, known as the "reciprocal demurrage law," and a recovery may be had, as at common law, without alleging any written demand for the cars.

[1] Reported in 136 N. W. 295.

[Note] Duty of carrier to furnish cars, independently of contract, see note in 8 L.R.A.(N.S.) 108.

Exclusiveness of statutory remedy for failure to furnish cars, see note in 26 L.R.A.(N.S.) 851.

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Reciprocal demurrage law.

This law does not diminish the common-law rights of shippers, but gives them additional statutory rights when its provisions have been complied with.

Action in the district court for Kanabec county to recover $1,962 for negligent failure and refusal of defendant to furnish cars for shipment of potatoes. From an order, Stolberg, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

J. D. Sullivan, for appellant.

T. P. McNamara, for respondents.

Philip E. Brown, J.

Appeal by the defendant from an order overruling its demurrer to the complaint.

The complaint states the following facts: During the years 1909 and 1910, the plaintiffs were engaged in the business of buying potatoes at Mora, in this state, and shipping the same therefrom over the defendant's line of railway. In the fall of 1909 and the spring of 1910, the plaintiffs had large quantities of potatoes ready for shipment over the defendant's road, and to that end, at different times during the said period, ordered cars from the defendant for such purpose. The plaintiffs were, at such times, ready to use the cars so ordered for such purpose, which the defendant knew, and the plaintiffs tendered the potatoes to the defendant for shipment. The complaint further alleges that the defendant negligently failed and refused to furnish any cars within a reasonable time after they were so ordered, and that because of such neglect and refusal the plaintiffs suffered damage in a stated amount.

The complaint alleges no contract or agreement on the part of the defendant to furnish the cars, nor is any cause of action stated therein under the provisions of the so-called "reciprocal demurrage law," Laws 1907, p. 25, c. 23 [R. L. Supp. 1909, §§ 2023—1 to 2023—13]; but is grounded on the theory that the defendant, by neglecting to furnish the cars as alleged, failed in its common-law duty as a common carrier, and is consequently liable to the plaintiffs

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for the resulting damages. No claim is made by the defendant, leaving out of account the said demurrage law, that the complaint does not allege facts sufficient to constitute a cause of action for the breach of the defendant's common-law duty to furnish cars within a reasonable time after demand, and for consequential damages; and it is clear that, if such claim were made, it could not be sustained. Richey & Gilbert Co. v. Northern Pacific Ry. Co. 110 Minn. 347, 125 N. W. 897. However, the point now made was not determined in the Richey case.

The defendant urges as the sole ground of its demurrer that, in the absence of an allegation of the existence of an express contract between the parties for the furnishing of cars at some time certain, the provisions of the demurrage act apply, and that, in order for the complaint to state a cause of action, the plaintiffs should have pleaded a written demand for the cars in compliance with section 1 of said act. We cannot so hold.

In Pope v. Wisconsin Central Ry. Co. 112 Minn. 112, 115, 127 N. W. 436, 437, where a recovery was sought by a shipper against a carrier on the ground that a specific oral contract had been made and violated, for the furnishing of cars at a particular time, the contention above stated was made and overruled; the court saying, by Chief Justice Start: "The defendant further claims that the contract relied upon by the plaintiffs as the basis of this action, being an oral one, is within the purview of Laws 1907, c. 23 (R. L. Supp. 1909, §§ 2023—1 to 2023—13), known as the 'reciprocal demurrage law,' and is therefore void, because the request for the cars was not in writing. The act referred to has no application to voluntary contracts between carriers and shippers, for its purpose is to provide the methods whereby the shipper may secure from a railway carrier cars for the transportation of his freight within the time limited by the act, or subject it to the penalties there provided. Where the shipper seeks to avail himself of the remedies provided by the act, he must make his demand for cars in writing. The plaintiffs in this case did not proceed under the act; hence it is not relevant to this case."

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See also W. H. Ferrell & Co. v. Great Northern Ry. Co. 114 Minn. 531, 131 N. W. 1135.

The defendant attempts to distinguish these cases from the instant one on the ground that in both of them a common-law contract to furnish cars was involved, and urges, further, that it was the purpose of the demurrage act, in providing that applications for cars should be in writing, to prevent perjury; and, while conceding that such act does not attempt to deprive the shipper of any right of action which he would have had at common law in the absence of the act, the defendant urges that its fair construction requires a holding that where contractual relations do not exist the shipper, to avail himself of the said right of action, must, in order to eliminate controversy as to what his demand for cars actually was and the time when he required them to be furnished, serve on the carrier a written demand, in accordance with section 1 of the said chapter 23.

We think that the cases cannot be thus distinguished on principle. The same opportunity for the commission of prejury and the same uncertainty as to when the cars should be furnished exist in both cases, the matter resting in parol in each, and it is not apparent why it should be inferred by construction that the legislature intended to make a written demand for cars essential in any case where a recovery is not sought under the act. This aside, section 10 of the act provides:

"The payment by said railroad company of demurrage provided in this act, shall in no way invalidate or offset any claim any shipper or consignee may have or make for damages occasioned by delay on the part of such railroad company, or other cause, but shall be a further remedy and in addition to any already existing."

The right to invoke the common-law remedy to recover damages for the unreasonable failure of a carrier to furnish cars, without a written demand therefor, in the absence of contractual relations, is a valuable one, and it cannot be assumed that the legislature intended to abrogate it unless such intention is clearly expressed. We hold that the common-law rights of shippers have been in no manner decreased by the reciprocal demurrage law. Its effect is to create

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additional statutory rights when its provisions have been complied with.

Order affirmed.

WILLIAM C. FOSTER v. WILLIAM B. GAGE.[1]

May 24, 1912.

Nos. 17,499—(107).

Delinquent tax list — designation of newspaper.

Held, following Eastman v. Linn, 26 Minn. 215, 2 N. W. 693, and similar cases, that there was a failure properly to designate the newspaper in which to publish the delinquent tax list in question in this action, and that the court acquired no jurisdiction to enter a judgment in the tax proceedings.

Same — act not curative.

The failure to so designate the newspaper was not cured or remedied by Laws 1902, c. 2, § 12 (R. L. 1905, § 914).

Construction of act of 1902.

That statute was intended to remedy such defects and irregularities in the designation as were not necessarily fatal to the jurisdiction of the court; such as might without substantial prejudice to the rights of the property owner be corrected or disregarded.

Action in the district court for Morrison county under R. L. 1905, § 972, to quiet title of plaintiff to certain lands, or if the title appear invalid, to ascertain the amount of taxes, penalties and costs adjudged a lien against the premises. The separate answer of defendant Gage alleged that several causes of action were improperly united. The case was tried before Nye, J., who made findings and as conclusion of law ordered judgment in favor of defendant Gage, adjudging him to be the owner of the land and that plaintiff was entitled to a tax lien against the premises amounting to $165.94.

[1] Reported in 136 N. W. 299.

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From an order denying his motion to vacate the decision and for a new trial, plaintiff appealed. Affirmed.

William G. White, for appellant.

D. M. Cameron, for respondent.

BROWN, J.

This action involves the validity of plaintiff's alleged tax title to the land in controversy. The trial court held it invalid, ordered judgment for defendants, and plaintiff appealed from an order denying a new trial.

Several objections to the title were urged by defendants in the court below and again in this court, only one of which we find necessary to consider. As we hold the particular objection sound, all others become immaterial. The question is, Was there a sufficient compliance with the statutes requiring the designation of a newspaper in which to publish the delinquent tax list to vest the court with jurisdiction of the tax proceedings? And, if there was such a failure, was it avoided or cured by section 12 of chapter 2 of Laws 1902 [p. 8], under which the validity of the proceedings here in question must be tested?

1. It appears from the evidence that no resolution of any kind attempting to designate a newspaper in which to publish the delinquent tax list was on file in the office of the clerk of the district court at the time of the trial, and no record that one had ever been filed. But the presumption perhaps is that a resolution was properly filed. Section 800, R. L. 1905. The presumption, however, is not conclusive, and it was open to defendants affirmatively to show that no proper resolution was ever passed by the county board, or designation made by the county auditor. The records of the county board were offered in evidence and appear to contain but one reference to or mention of the subject, and that in the following language, namely:

"The Herald Printing Company offered to print the delinquent tax list for taxes of the year 1903, for the legal rate as by law prescribed, and upon a resolution duly made and carried the Herald

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Printing Company was awarded the contract of publishing the delinquent tax list for 1903."

No other evidence of the designation of a newspaper appears, and the court below was justified in concluding that the above record presents the only action taken by the board upon the subject. That it was not a compliance with the statute is quite clear. The rule since the first enactment of the statute has been that some newspaper, as distinguished from the editor or publisher of a particular paper, though the paper be named, must be designated for this purpose, and the act of awarding the contract to the editor or publisher of a particular newspaper is not a compliance with the law.

In Eastman v. Linn, 26 Minn. 215, 2 N. W. 693, the contract for publishing the delinquent tax list was, on motion, awarded to "F. Daggett, editor of the Litchfield News Ledger," and the court held the statutes not complied with. In Hall v. County of Ramsey, 30 Minn. 68, 14 N. W. 263, the contract was awarded to "H. P. Hall, of the Daily Globe," and in declaring the designation not in compliance with the statute the court followed the Eastman case. The rule there laid down has been uniformly followed in subsequent cases. 2 Notes to Minn. Cases 36.

The resolution in the case at bar, or whatever the action of the board as disclosed by the extract from its records may be termed, names no newspaper in which the tax list shall be published, but refers only to the "Herald Printing Company." That designation is no nearer a compliance with the statute than a resolution awarding the printing of the list to "F. Daggett, editor of the Litchfield News Ledger," or to "H. P. Hall of the Daily Globe." No newspaper was thereby designated, and the rule of the Eastman case applies.

Counsel cite and rely upon Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 N. W. 391, as a departure from the former holdings of the court, and as sustaining the designation here in question. The two cases are essentially different. In the case at bar the publishing company only was named, while in the Scott case the newspaper, namely, the "Minneapolis Tribune," was expressly designated; the editor or publisher not being referred to. The court construed the

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action of the county board there involved as a sufficient designation of the newspaper. In other words, the court took a broad and substantial view of the proceedings of the board, and held that an intention to name the Minneapolis Tribune was clearly shown. But there was no intention of departing from the rule of the Eastman case or of unsettling the law upon this subject. The rule has too long been followed and applied to be departed from except upon express legislative action. It is quite probable that, had the resolution in question named the newspaper instead of the publisher, it would have been held, under the Scott case, as sufficient compliance with the law. But the language employed clearly brings the case within our earlier decisions which we follow and apply.

2. The further contention that this failure of the board was not fatal to the jurisdiction of the tax proceedings, and that the defect, whatever its nature, is cured and obviated by section 12, c. 2, Laws 1902 (See R. L. 1905, § 914), is not sustained. The resolution or action of the board not amounting to a compliance with the statute must be treated as a total failure or omission to act, and we have only to inquire whether the statute referred to was intended to remedy a situation of the kind. That statute provides, among other things, in referring to the publication of the delinquent tax list, that, when the last publication shall have been made, the notice shall be deemed to have been served and the court to have acquired full and complete jurisdiction, and "such jurisdiction shall not be in any way affected by any error in making the list filed with the clerk, nor by any error, irregularity or omission in the assessment or levy of the taxes, or in any other proceedings prior to filing the said lists; nor by any mistake in copying the list for publication; nor by any mistake in publishing said list; nor in the designation of the newspaper wherein such list is published. * * *"

We are unable to give the force and effect to this statute counsel so earnestly contends for. It has long been the law of the state that a proper designation of the newspaper in which to publish the delinquent tax list is essential to vesting jurisdiction in the court to proceed to the entry of judgment against the delinquent lands. The rule

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has become a rule of property, and should not be held to have been abrogated except upon clear and definite legislation. In the absence of express legislation to the contrary, the statute referred to should be construed in harmony with this settled rule of the law, and not as an indirect effort to overturn it. We are clear that there was no intention by its enactment to depart from the rule or of attempting to make a failure of compliance with the designation statute a mere irregularity or informality.

The first part of the section, declaring that the jurisdiction of the court shall not be affected by "any error, irregularity or omission * * * in any other proceedings prior to filing the said lists," was evidently not intended to cover a failure properly to designate the newspaper in which to publish the list, for further along in the section it is provided, properly construed, that no mistake in the designation should be fatal to the jurisdiction of the court. If the legislature intended by the first clause to cover all irregularities in the designation, or a total failure to designate the newspaper, then the later clause expressly referring to that subject was a waste of words and wholly unnecessary. Under the general rule for the construction of statutes we are bound to give force and effect to all parts of the section, to the exclusion of the idea that any part or portion thereof is meaningless or unnecessarily made a part thereof. So construing this statute, we hold that the legislature intended to deal specially with the matter of designating a newspaper in which to publish the delinquent list, and did not intend to declare a failure of compliance with the statutes in that respect not fatal.

Properly construed, this part of the statute must be held to have been intended to remedy and cure informalities and mistakes in the designation of the newspaper not necessarily fatal to the jurisdiction of the court; defects of the character shown in the Scott case, and such as might without prejudice to the substantial rights of the property owner be corrected or disregarded. In that case the intention of the county board to designate the Minneapolis Tribune was clear, but the manner of designation was not in matter of form in strict compliance with the statutes, yet it was sufficient as notice of the

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selection of that paper. It was held sufficient, and section 12 was cited in support of the decision. But in the case at bar the action of the county board was in legal effect a failure to comply with the statutes, and was not a mere informality within the meaning of our previous decisions.

Our conclusions, therefore, are that there was no designation of the newspaper in which to publish the delinquent tax list in question, resulting in a failure to confer jurisdiction upon the court, and the failure was not avoided or cured by section 12.

Order affirmed.

EMIL AHO v. ADRIATIC MINING COMPANY.[1]

May 24, 1912.

Nos. 17,502—(69).

Servant sent to place of danger — duty of master.

The rule that, where the master orders his servant into a place of danger to do some specified work, he owes the servant the affirmative duty to exercise reasonable care to protect him from injury while so engaged followed and applied.

Verdict sustained by evidence.

Evidence *held* to support the verdict, and that the record presents no reversible error.

Action in the district court for St. Louis county by the guardian ad litem of Emil Aho to recover $2,500 for personal injuries received by the minor while in defendant's employ. The defense was

[1] Reported in 136 N. W. 310.

[Note] Servant's assumption of risk in obeying orders to perform obviously dangerous work, see note in 4 L.R.A.(N.S.) 830.

Servant's right of action for injuries received in obeying a direct command, see note in 30 L.R.A.(N.S.) 436.

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contributory negligence on the part of plaintiff and that he voluntarily assumed the risk. The reply was a general denial. The case was tried before Ensign, J., and a jury which returned a verdict in favor of plaintiff for $950. From an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Spencer & Marshall and *J. A. P. Neal,* for appellant.

W. E. Culkin and *John E. Samuelson,* for respondent.

BROWN, J.

Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts are as follows: Defendant, a corporation, owns and operates an underground iron ore mine, in and about which it employs a large number of men, and all necessary machinery and instrumentalities for taking and removing the ore from the mine. A perpendicular shaft extends from the surface of the ground one hundred fifty feet in depth, there connected with underground tunnels or levels leading to the ore deposits. Within this shaft, a "skip," so called, was operated and used in removing the ore from the mine to the surface, where it was loaded upon cars and carted away. The skip is in fact an elevator, consisting of a large iron bucket which, when lowered to the bottom of the shaft, is loaded with ore, and, by means of cables and other appliances, is raised to the surface by motive power. The cables are attached to and controlled by a stationary engine, located some distance from the mouth of the shaft, and are operated by an engineer upon signals from workmen or the foreman in charge of the hoisting operations. When lowered in the shaft, this skip or bucket rests in a hole below the surface of the bottom of the mine to such a depth that the ore brought by tram cars from the drifts or levels may be transferred to the bucket by merely tipping the same and permitting the ore to drop into the same, when it is raised to the surface. Occasionally it became necessary to clear out

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this skip hole; for ore and earth would accumulate therein, interfering with the convenience of the work. When necessary to so clear it out, the skip would, on proper signal to the engineer, be raised to a safe position within the shaft, and there held stationary until the work was completed. In doing this work, an employee would be sent into the hole, directly beneath the overhanging skip, to shovel out the accumulations therein and put it in order.

Plaintiff was in the employ of the defendant at this mine as a common laborer. He was unfamiliar with the dangers of the particular work, and had received no warnings or instructions with reference to it. He was a foreigner, unable to speak the English language, though he could sufficiently comprehend and understand the orders of his superiors. On the day of the accident of which he here complains, plaintiff was set to work cleaning out the skip hole. The skip was raised a distance of about seventy feet, on a signal to the engineer, and plaintiff got into the hole, and was performing his work, when suddenly, and without notice or warning, the skip was lowered by the engineer, thereby crushing plaintiff beneath it and severely injuring his person. It appears that the engineer received a signal to lower the skip; but who gave the signal the evidence fails wholly to show, except that it does appear that it was not given by plaintiff or his fellow workman.

The complaint charges that plaintiff's injuries were caused by the negligent failure of defendant to provide him with a reasonably safe place in which to do his work, or to keep and maintain the place in a reasonably safe and suitable condition, or to guard or protect him while engaged in this hazardous work; that plaintiff was unfamiliar with the dangers of this employment; and that defendant negligently failed to warn and instruct him concerning the same, in consequence of which, and other charges of negligence not necessary to refer to, plaintiff was injured.

The trial court submitted the case to the jury, and left to them the question of defendant's negligence in the respects substantially as just stated. In addition to their general verdict, the jury were re-

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quired to designate the particular fellow servant whose negligent act caused the injury, if they found such to be the fact. To this special question, the jury answered that the negligence was that of the "defendant company."

The contentions on this appeal are: (1) That the evidence wholly fails to establish a case of negligence, and therefore that the court below erred in not directing judgment for defendant; and (2) that for certain errors occurring on the trial a new trial should have been granted.

1. The pleadings and evidence bring the case squarely within the general rule, often applied by the court, that, where the master orders the servant into a known dangerous place to do and perform certain specified work, he owes the servant the affirmative duty to exercise reasonable care for his protection while so engaged. Cody v. Longyear, 103 Minn. 116, 114 N. W. 735; Dizonno v. Great Northern Ry. Co. 103 Minn. 120, 114 N. W. 736; Fitzgerald v. International Flax Twine Co. 104 Minn. 138, 116 N. W. 475; Perras v. A. Booth & Co. 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Hess v. Adamant Mnfg. Co. 66 Minn. 79, 68 N. W. 774; Lohman v. Swift & Co. 105 Minn. 148, 117 N. W. 418.

The position of plaintiff, while engaged in cleaning out the skip hole, was dangerous, unless the skip itself was held in a secure and stationary position above him. This situation was known to defendant; and it was under legal obligation to protect plaintiff while he was so engaged. He was not so protected; on the contrary, the skip was lowered and plaintiff, in consequence, crushed beneath it. It does not matter, within the authorities cited, who caused the skip to be lowered. The fact that it was lowered was evidence of the failure of defendant to discharge its duty to protect plaintiff; and it was not necessary that plaintiff point out the person who gave the signal to the engineer.

Our examination of the record leads to the conclusion that the evidence amply supports the verdict, and that the jury was fully justified in answering the special question submitted to them, to the effect that plaintiff's injuries were caused by the negligence of "de-

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fendant company." The cause of the accident is not, as contended by defendant, left to conjecture or speculation; on the contrary, it clearly and conclusively appears that it was caused by lowering the skip, and that it was lowered by the engineer in response to a signal so to do. It is true that it does not appear who gave the signal; but the absence of this information does not leave the cause of the accident in the least doubt. Defendant was negligent in not seeing to it that the skip was not lowered during the time plaintiff was engaged in the particular work. Berneche v. Hilliard, 101 Minn. 366, 112 N. W. 392, and other like cases are not in point. The servant was not, in that case, ordered into a place of danger, entitling him to protection while thus engaged.

2. We have examined the assignments of error made the basis for the motion for a new trial, and find no sufficient reason for disturbing the order appealed from. The court charged the jury that if they were "unable to determine from the evidence why the skip in question came down at the time plaintiff was injured there can be no recovery in this action. No verdict in the case can be based on mere theory, speculation, or guesswork as to the cause of the skip coming down." It is contended that, because the evidence did not point out the person who gave the signal to the engineer to lower the skip, the cause of its lowering could not be found by the jury, as stated in the instruction quoted; and therefore that the verdict is contrary to the charge of the court, and should be set aside. We do not sustain this contention.

Just what the learned trial court intended the jury to understand from this instruction is not clear; but it is evident from other portions of the charge that the court did not intend the effect now claimed for it by defendant. The cause of the lowering of the skip was made clear by the evidence. It was lowered in response to a signal given for that purpose. As heretofore stated, it was not incumbent upon plaintiff to point out the person who gave the signal; and the fact that it was lowered upon him while occupying the dangerous position was evidence that defendant failed in its duty to protect him.

3. After the accident, plaintiff was removed from the shaft, and,

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on being taken to the engine house for temporary treatment, one of his assistants asked the engineer why he lowered the skip. In response, the engineer said that he had been signaled to do so. All this occurred within twenty minutes after the accident. The admission of this evidence is assigned as error. The evidence was admissible. The question is covered by Hyvonen v. Hector Iron Co. 103 Minn. 331, 115 N. W. 167, 123 Am. St. 332.

4. The other assignments do not require special mention. We have fully considered them, and find no reversible error.

Order affirmed.

JOSEPHINE FRITZ v. O'BRIEN LAND COMPANY.[1]

May 24, 1912.

Nos. 17,540—(91).

Vendor and purchaser — payment of taxes.

A deed, pursuant to a contract for the delivery thereof, dated December 22, 1906, was executed and tendered by the grantor, this plaintiff, to the grantee therein before the taxes for that year became due and payable. It was not then accepted, because the grantee objected to the title, but was left, at defendant's request, in a bank, which was to deliver it upon receipt of the purchase price. While so held and before delivery, the taxes became due. In this action, brought by the grantor, after delivery of the deed, for the balance of the purchase price, against the party to whom the grantor had contracted to deliver the same, *held*, such party cannot offset against the purchase price the taxes for 1906, paid by it without plaintiff's implied or express direction.

Action in the district court for Big Stone county to recover $1,875, balance alleged to be due upon the purchase price of a certain farm. The reply was a general denial. The case was tried before Johnson, J., acting for the judge of the Sixteenth judicial district, who made

[1] Reported in 136 N. W. 301.

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findings and as conclusion of law ordered judgment in favor of plaintiff for $2,349. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Cliff & Purcell, for appellant.

Schmidt & Waters, for respondent.

HOLT, J.

Plaintiff sued the defendant for the balance due for the purchase price of a farm, and recovered a verdict, and defendant appeals from the order denying a new trial.

On December 22, 1906, the defendant, a corporation, by a written agreement, sold one hundred sixty acres of land, then owned by plaintiff, in Big Stone county to T. F. Mahoney for $5,100. Subjoined to the contract was this agreement, executed by plaintiff: "I guarantee and deliver to the O'Brien Land Company a deed conveying (describing the land), together with abstract of title complete for the sum of four thousand nine hundred dollars ($4,900), on which I acknowledge payment of $25.00." At defendant's direction, plaintiff executed a deed to the land, naming T. F. Mahoney as grantee, and sent the same, with abstract, by mail, December 29, 1906, to the Big Stone County Bank at Graceville, Minnesota. The bank was to deliver the deed on receipt of the money. Mr. A. D. O'Brien was the president of both the bank and the defendant. Although it is admitted in the answer that plaintiff was the owner of the land, some objection was raised by Mr. Mahoney's attorneys to the title. Plaintiff offered to pay back the $25 received on the purchase price and take back the deed. This the defendant refused. Then evidently some proceedings were taken by plaintiff to make the record title satisfactory to the grantee in the deed; and, being desirous to farm the land while this was being done, possession was given him upon payment of $3,000 of the purchase price and the execution of the following agreement, dated April 19, 1907, signed by the president of defendant and plaintiff's agent:

"It is understood and agreed that $3,000 is this day to be paid on the purchase of [describing land] on the terms of contract under

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date of December 22, 1906, and Ed. Fritz agrees to give possession of the land by or before Thursday, April 25, 1907, and further agrees (Fritz) to allow the land to be farmed any time after this date, the balance due Fritz of $1,875 to be paid when the title is perfected according to the opinion of Francis & Rowell, attorneys of Tipton, Iowa. The 1906 taxes to be adjusted later, that is, who is to pay them; if Fritz is to pay them the amount is to be deducted from the $1,875, if he is not to pay them, the full $1,875 to be paid. It is further understood that the deed is to be recorded at this time and taxes paid but the tax payment [that is by whom paid] to be adjusted later."

Mr. Mahoney took possession April 25, 1907, and the deed was recorded April 20, 1907. There was never any further adjustment or agreement as to the taxes for the year 1906. The defendant admitted that plaintiff was entitled to $1,875, less $52.57, the taxes for 1906, but claimed that this sum did not become due and payable, so as to draw interest, until the title was perfected September 11, 1907. The trial court computed interest from the time possession of the farm was delivered to Mr. Mahoney, and disregarded defendant's claim for taxes.

As we understand appellant now, the rule adopted by the trial court for computing the interest is not questioned on this appeal. Defendant, by requesting amended findings to the effect that the recovery allowed at $2,349 be reduced to $2,296, and assigning error on the court's refusal to do so, evidently challenges the correctness of the amount of the judgment only as to the failure to deduct the amount of the taxes, namely, $52.57. And as incident thereto, perhaps, the exclusion of some testimony in relation to the defect in the title as the cause for the delay in closing the transaction.

The defendant contends that the court failed to make a finding on a material issue voluntarily litigated, though, perhaps, not raised by the pleadings, namely, as to who is liable for these taxes which defendant claims it paid in August, 1907. It seems to us the court was not bound to place the liability for the payment of these taxes

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upon the shoulders of anyone, unless the evidence required a finding that plaintiff should pay them.

Assume that the testimony was properly before the court upon defendant's right to recover, or offset these taxes against the balance of the purchase price, we have this situation: There never was any agreement by plaintiff to reimburse the defendant for taxes it might pay either to the county treasurer or anyone else. She did not agree so to do by either of the instruments above set out, and the testimony fails to show any oral or written agreement to pay. On the contrary, she protested against doing so. If there is any liability on her part to pay taxes, it must be found in the covenant against incumbrances in the deed conveying the land to T. F. Mahoney; but that is admitted by the terms of the agreement of April 19, above set out, to have been executed in pursuance of the contract entered into December 22, 1906, before any taxes became an incumbrance as between grantor and grantee. Even were it possible to read into the contract of December 22, 1906, an implied agreement that the deed, when finally delivered, should contain a warranty against the taxes for 1906, the deed was delivered pursuant to the contract, and therefore the terms of the contract became merged in the covenants of the deed; and, if any liability exists on the covenants therein, it inures to the grantor, Mr. Mahoney. If defendant paid the amount for the taxes in August, 1907, to anyone, it was not paid at the request of plaintiff, but with knowledge of defendant that she repudiated all liability for taxes.

Under no view of the evidence could a finding be sustained allowing the defendant any set-off for taxes upon plaintiff's demands against it. We do not consider the rulings of the trial court as to the defects in plaintiff's title, or the cause for delay in closing the transaction, to have been prejudicial to the defendant. It sufficiently appears that there was some delay, due to objections to the record title, and that plaintiff, when defendant insisted that she should carry out her first agreement, undertook to remedy the defects, whatever they might have been.

Order affirmed.

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JOHN BODIN v. DULUTH STREET RAILWAY COMPANY.[1]

May 24, 1912.

Nos. 17,549—(112).

Negligence of pedestrian — question for jury.

Where it appears that a pedestrian, about to cross street railway tracks at a regular street crossing, looked twice after he left the curb toward the approaching car, but the night was dark, the speed of the car was unusually high, the noise on the rails as then laid not great, the headlight on the car was smaller and dimmer than ordinarily used on the cars there operated, the street was being paved with paving stones, and débris scattered around, the rails being raised six or seven inches from the concrete base, then partly laid, requiring attention to avoid the obstructions, it becomes a question for the jury whether such pedestrian, after he so looked and saw the car, was justified, in the exercise of ordinary care, to conclude that he could cross the track in safety.

Verdict sustained by evidence.

The finding that defendant ran the car at a negligently high speed and failed to give the usual warning of its approach is sustained by the evidence.

Damages not excessive.

Where the only next of kin was decedent's mother, sixty-seven years old, and to whose support he had regularly contributed for the last three years, *held*, that $2,000 damages for his death was not excessive.

Action by the administrator of the estate of Carl Upstrom, deceased, to recover $5,000 for the death of his intestate. The answer alleged that the accident was due to the negligence of deceased. The reply was a general denial. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for $4,000. Defendant's alternative motion for judgment was denied, and that for a new trial was granted, unless plaintiff consented to a reduction of the verdict to $2,000. Plaintiff consented. From the order denying judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

[1] Reported in 136 N. W. 302.

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Thomas S. Wood, for appellant.
Andrew Nelson and *George B. Sjoselius,* for respondent.

HOLT, J.

The action is for injuries resulting in the death of plaintiff's intestate through the alleged negligence of the defendant. The trial resulted in a verdict of $4,000. The defendant's motion for judgment notwithstanding the verdict was denied; also the alternative motion for a new trial, if plaintiff remitted $2,000 from the verdict. Plaintiff remitted, and defendant appeals.

The defendant is a street railway company operating by electric power a line, among others, between Duluth and West Superior upon a street called Garfield avenue. The north-bound track of the line is east of the center of the street, and the south-bound on the west thereof. At about 10:30 o'clock on the night of September 12, 1910, a car of the defendant running north collided with Carl Upstrom, plaintiff's intestate, inflicting injuries resulting in death the next day. The testimony tended to show that the night was dark and cloudy; one witness claiming it was somewhat foggy. The usual street light was not burning. The street was being paved with sandstone blocks, laid on a concrete base. The testimony is somewhat obscure as to whether the paving of Garfield avenue was completed further than to the east rail of the southbound track. At any rate, all of the avenue east of the west rail of the northbound track had only the base. The rails were six or seven inches higher than the concrete. The testimony also tended to show that there were sandstone blocks and débris between the tracks and rails. Where the accident occurred is a short cross street, called Six Hundred. The collision took place on the north crossing of this street.

Upstrom and a companion, since deceased, immediately before the accident, came out of the boarding house where they lived, at the north-west corner made by the intersection of the street Six Hundred with Garfield avenue, and were observed by a witness, who stood on the sidewalk at the northeast corner. This witness testified that he heard Upstrom and his companion, when they were about

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three feet east of the west curb of the avenue, talk about whether the car then approaching from the south on the north-bound track was so far away that they could safely cross, and that they looked toward the car, one observing that there was ample time; Upstrom saying to his companion, Anderson, as he pointed to the coming car, "There is one of them coming away down there," and Anderson, responding, said: "We can make that one easy; it is so far away." They then walked right across, or, perhaps, a little slanting, since they started a few feet north of the north crossing. This witness also states that he observed that Upstrom, who was about three feet in the lead, again looked toward the car when about nine feet from the track, walking from the time he started at a steady, brisk gait. When Upstrom looked the first time, the car appeared to this witness to be a block and a half away, and when the second time about half a block. Upstrom was struck, this witness says, when he was stepping over the west rail. The deceased was thrown a few feet forward and away from the car, and the car was stopped, so that the rear vestibule was about eighteen feet further north than the body; the car having traveled some sixty-eight feet after the collision. There was also testimony tending to show that the rails were new and dry, and that not much noise was made by the car in coming; that the headlight was not one of the ordinary ones used on cars traveling there, but one of smaller size and power; and, further, that the car was run at a speed of over twenty miles per hour without slacking up for crossings. The avenue was straight for about a mile towards the south, and all the way closely built; the buildings extending to the sidewalk.

We have set out the evidence tending most strongly to show that the deceased was not guilty of negligence, because, the jury having found that he was not, and this finding having been approved by the trial court, this court must consider the evidence in the most favorable aspect, so far as Upstrom's freedom from contributory negligence is concerned. While it is the settled law in this state that a person crossing a street railway at a street crossing is not required to use the same degree of care as one crossing the ordinary

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steam railway, still it is held that a person about to cross a street railway track must use his senses to discover if a car be in dangerous proximity. To fail to look, or to heedlessly proceed when the look discloses the danger, is negligence which defeats recovery. Either is manifest negligence where no excuse appears for failure to look, or for not acting on the information imparted by the sense.

In this case, the testimony disclosed that the deceased did look, and was aware of the approach of the car. It thus narrows down to this proposition: Would the ordinary prudent person in Upstrom's situation, by the information obtained by his senses of sight and hearing, have come to the conclusion that the crossing could not be made with safety? We may concede that if it had been daylight the inference would be irresistible that it would have been negligence to attempt the crossing under the circumstances. One can judge of the speed of an approaching object in daylight with some degree of exactness; but it is very difficult, if not impossible, so to do in the dark, when the only thing visible of the moving object is a headlight.

Defendant contends that this case is an exact counterpart of Metz v. St. Paul City Ry. Co. 88 Minn. 48, 92 N. W. 502. But we note that Metz, on a clear, still night, only looked once when he stepped off the curb; there was no obstruction in the street; he could have had his eyes on the approaching car all the time.

In the instant case, the testimony tends to show that the deceased looked twice after he was three feet from the curb; that the street was torn up, so that some attention was necessary to see where he stepped; that the noise made by the car on the rails as then laid was not great; that the speed was greatly in excess of the usual; that the night was dark, the street poorly lighted, and the headlight smaller than the one ordinarily in use. All these considerations, we think, make it a question of fact for the jury to say if the conduct of the deceased, in attempting the crossing, was negligence. The deceased had the right to assume, until informed to the contrary by such observation as a prudent person could then have made, that the car was running at the ordinary speed, and under the or-

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dinary rules, which require the motorman to have the car within control on passing over crossings where he may anticipate, not only that people are using the crossings, but that he may be required to stop for passengers. As stated in Bremer v. St. Paul City Ry. Co. 107 Minn. 326, 120 N. W. 382, 21 L.R.A.(N.S.) 887: "The pedestrian's duty is to be considered in connection with his justified presumption that the street car company, having no priority of way, will be careful, especially at a crossing."

And, again, in O'Brien v. St. Paul City Ry. Co. 98 Minn. 205, 207, 108 N. W. 805, it is said:

"It is the settled law that it is the duty of a street car company to keep its cars under reasonable control, and to run them at a reasonable rate of speed, when they are near street crossings in crowded parts of a city; that it is not negligence in law to cross a street railway track in front of an approaching car which a person using the highway has seen, and which does not appear to him to be dangerously near, and which would not have been so in fact, had it been running at its ordinary rate of speed and under proper control; and that such a person is not bound to anticipate that the motoneer would be negligent, reckless, or wilful."

So to the same effect in Albee v. Boston, 209 Mass. 6, 95 N. E. 110; Deitring v. St. Louis, 109 Mo. App. 524, 85 S. W. 140; Consolidated v. Glynn, 59 N. J. L. 432, 37 Atl. 66; Tesch v. Electric, 108 Wis. 593, 84 N. W. 823, 53 L.R.A. 618; Saunders v. City, 99 Tenn. 130, 41 S. W. 130.

The cases cited by appellant, to the effect that the motorman has a right to assume that a pedestrian, about to cross the track in front of the approaching car, will exercise due care, state propositions of well established law; also the cases holding that it is negligence to fail to use one's senses, or where it is clear that the information gained by the use of the senses was heedlessly disregarded. But such is not the case at bar, if the jury believed, as it had a right to do, the testimony most favorable to plaintiff's contention that Upstrom was using ordinary care in attempting to make the crossing.

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No argument in appellant's brief is presented on the error assigned that defendant's negligence was not proven. It is sufficient to say that, both as to speed and absence of warning, the evidence amply sustains the finding of such negligence. The issues, both as to defendant's negligence and plaintiff's contributory negligence, were clearly and with great impartiality submitted to the jury; and their findings thereon having been approved by the trial court, we find no legal cause to disturb them.

Error is assigned on the amount of damages as reduced, on the claim that they are excessive. The only argument presented is this: "The damages were clearly excessive, even as reduced. Plaintiff's intestate had only contributed, all told, a sum less than a hundred dollars to the support of his mother." Plaintiff's intestate was forty-eight years old, industrious, strong and healthy. His mother was sixty-seven years old, with a life expectancy of over ten years. It was shown that each year for three years before his death he had sent her money, the last in July, 1910, $40.35. His stepbrother testified to knowledge of these three remittances. Whether he had sent other moneys when such stepbrother was not present does not appear. In the following cases, Thomas v. Chicago Great Western R. Co. 112 Minn. 360, 128 N. W. 297; Holden v. Great Northern Ry Co. 103 Minn. 98, 114 N. W. 365, and Bremer v. Minneapolis, St. P. & Sault Ste. M. Ry. Co. 96 Minn. 469, 105 N. W. 494, amounts have been approved which indicate that we cannot now hold that $2,000 is excessive in the present case.

The order appealed from is affirmed.

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JOHN J. SUTTON v. E. A. BREKKE.[1]

February 9, 1912.

Nos. 16,899—(16).

Husband and wife — contract as to real estate.

Plaintiff, by virtue of some arrangement with the husband of the mortgagor, sought to recover rent of premises upon which he held a mortgage. *Held:* The husband had no authority to enter into the contract, and it was invalid. R. L. 1905, § 3609. [Reporter.]

Action begun in justice court, where plaintiff recovered a verdict for $35. From the judgment defendant appealed on questions of law and fact to the district court for Marshall county. The case was tried before Grindeland, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

J. J. Sutton and *Charles Loring*, for appellant.

J. J. Olson and *E. A. Brekke*, for respondent.

PER CURIAM.

This action was brought in justice court to recover the sum of $35, where plaintiff had a judgment. Defendant appealed upon questions of law and fact to the district court, where a verdict was returned in his favor. Plaintiff then appealed to this court from an order denying a new trial.

The money sought to be recovered represents the rent due from a tenant of real property belonging to a Mrs. Willer. It is unnecessary to state how it came into the hands of defendant, who was not the tenant. Plaintiff had a mortgage upon the property, and he claims the money by right of some arrangement with the husband of Mrs. Willer, as the result of which he occupied the position with respect to the property of mortgagee in possession. He claims that under the arrangement with the husband plaintiff was placed in the possession of the property, with the right to collect the rents from the tenant, applying the same upon a prior foreclosed mortgage and upon the one held by himself. Plaintiff's whole case depended upon the validity of this arrangement. It is quite clear that the husband had no authority to enter into the contract and that it was wholly invalid. Section 3609, R. L. 1905; Van Brunt v. Wallace, 88 Minn. 116, 92 N.

[1] Reported in 134 N. W. 289.

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W. 521. On no other theory of the case did the evidence show a right of recovery in plaintiff.

There were no errors in the admission or exclusion of the evidence.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of illness, took no part.

PHILIP EMPEY v. WALTER D. LOVELL.[1]

February 9, 1912.

Nos. 17,388—(141).

Offer of evidence.

Action against a contractor engaged in laying water mains in streets of a village, for injuries to plaintiff's horse, which strayed at night and fell into an open trench. It was conceded at the trial that defendant was under legal obligation to exercise reasonable care, by the erection of guards and barriers, to prevent stray animals from getting into the trench. There was no guard along the trench save the excavated earth on one side and white lanterns posted at night. *Held:* The trial court properly rejected defendant's offer to show that other careful contractors erected no guards or barriers other than the pile of earth on one side. Within the conceded rule of responsibility this was wholly insufficient, and the failure to place other guards along the trench was negligence as a matter of law. [Reporter.]

Action in the district court for Waseca county to recover $200 damages for injuries to a horse resulting in his death. Defendant Lovell answered alleging the injury was caused through plaintiff's negligence. The case was tried before Childress, J., who dismissed the action as to the village of Janesville, and a jury which returned a verdict in favor of plaintiff for $175. From an order denying

[1] Reported in 134 N. W. 289.

[Note] As to liability for act of independent contractor affecting safety of highway, see note in 17 L.R.A.(N.S.) 758.

Liability of highway contractor for dangerous conditions where municipality, county, or town is not liable, see note in 27 L.R.A.(N.S.) 1009.

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his alternative motion for judgment notwithstanding the verdict or for a new trial, defendant Lovell appealed. Affirmed.

B. H. Bowler, for appellant.

L. D. Rogers and *Moonan & Moonan*, for respondent.

PER CURIAM.

Defendant Lovell was engaged under a contract with defendant village in laying water mains in some of the public streets of the village. He had excavated a trench along one of such streets about seven feet deep, but failed to erect any guards or barriers to prevent persons or animals from falling into the same, save as the earth thrown upon one side of the trench, with lanterns at night, might serve as such. A horse belonging to plaintiff, at some time during the night slipped his halter and escaped from the barn of plaintiff, which was located upon this particular street, and got into the trench, receiving injuries which caused his death. Plaintiff brought this action for the value of the horse, charging negligence in the failure of defendants to erect suitable barriers along the sides of the trench. The action was dismissed as to the village, and proceeded to trial as against defendant Lovell alone. Plaintiff had a verdict, and Lovell appealed from an order denying his alternative motion for judgment or a new trial.

It is contended on this appeal that the evidence fails to establish actionable negligence on the part of defendant, that plaintiff's contributory negligence affirmatively appears, and, therefore, that the trial court erred in not awarding judgment for defendant notwithstanding the verdict. Our examination of the record leads to the conclusion that the evidence made both questions issues of fact for the jury, and that the verdict is sufficiently supported.

It was conceded on the argument, and such seems to have been the theory of the trial, that defendant was under legal obligation to exercise reasonable care, by the erection of guards and barriers, to protect stray animals from getting into the trench. In view of this concession, and the fact that no guards whatever were placed along the trench, save the excavated earth upon one side thereof, upon which white lanterns were posted at night, it is clear that the court properly rejected defendant's offer to show that other careful contractors performed similar work in the same manner, erecting no guards or barriers other than the pile of earth thown out. This was, within the conceded rule of responsibility, wholly insufficient, and the failure to place other and more appropriate guards along the trench was negligence as a matter of law. The custom of other contractors showing a similar failure was, therefore, not competent, and was properly ruled out. Larson v. Ring, 43 Minn. 88, 44 N. W. 1078. The bank of earth along the trench, with lanterns at night, would no doubt serve as a

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warning of danger to persons approaching the same, but clearly not as to animals running at large.

Order affirmed.

PHILIP E. BROWN, absent on account of illness, took no part.

W. B. JORDAN and Another v. NORTHWESTERN ELECTRIC EQUIPMENT COMPANY and Others.[1]

February 9, 1912.

Nos. 17,393—(220).

Action in the district court for Ramsey county to compel delivery of certain account books. The case was tried before Hallam, J., who made findings and as conclusion of law found that defendant Northwestern Electric Equipment Company of New Jersey was the owner of the legal title to the books of account and entitled to possession thereof; that plaintiffs were entitled to full and free access to all of the books of account and to their proper use whenever and wherever the same might be required by them in any action. From an order denying plaintiffs' motion for a new trial, they appealed. Affirmed without statutory costs.

C. D. & R. D. O'Brien, for appellants.

How, Butler & Mitchell, for respondent.

PER CURIAM.

The respondent the Northwestern Electric Equipment Company of New Jersey is the successor in interest of the Northwestern Electric Equipment Company of Minnesota, by virtue of a bill of sale made to it by the appellants of all of the property, business, and good will of such corporation, reserving therefrom "all accounts and bills receivable, notes, bills of exchange, and other evidences of indebtedness."

This action was brought to compel a delivery of the account books of the corporation to the appellants. The trial court made findings of fact and conclusions of law in favor of the respondent the Northwestern Electric Equipment Company of New Jersey, and to the effect that it was the owner of the legal title of the books and entitled to the possession thereof, but that the appellants were entitled

[1] Reported in 134 N. W. 1134.

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to free access to them at all reasonable times, and to their use or contents as evidence whenever required. The appellants appealed from an order denying their motion for a new trial.

This appeal, by reason of the illness of one of the Justices, was heard by four members of the court, who are equally divided in opinion. Therefore, being of the opinion that the importance of the case does not justify its continuance and a reargument, the result is that the order appealed from is affirmed, without statutory costs.

Philip E. Brown, J., being absent on account of illness, took no part.

J. D. KRAUSE v. KATHERINE HOEFFKEN.[1]

May 3, 1912.

Nos. 17,471—(54).

Pleading.

Plaintiff moved the trial court for an order "overruling the demurrer" to the complaint "as frivolous," and for judgment thereon, basing his motion on the pleadings and all the files and proceedings in the action. The court overruled the demurrer and granted defendant leave to answer. *Held:*

1. The court correctly determined that the application was for an order overruling the demurrer, and not merely a motion to strike out the demurrer as frivolous.

2. It was not the duty of the court to consider the files in the action in which the judgment was obtained, but only the files in this action. [Reporter.]

Fraudulent conveyance — defense.

Action by a judgment creditor to set aside a conveyance made by the debtor with the alleged intent to hinder, delay and defraud plaintiff. If the judgment is void, that is matter of defense to be made by answer, not by demurrer. [Reporter.]

Demurrer.

It is elementary that a demurrer will not lie, except for defects apparent on the face of the pleading to which it is directed. [Reporter.]

Fraudulent conveyance — execution.

If an execution upon a judgment be returned unsatisfied in the county in

[1] Reported in 135 N. W. 979.

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which the judgment was obtained, it is unnecessary that another execution should issue in another county where the judgment is docketed, before bringing an action in the second county to set aside a conveyance by the judgment debtor. [Reporter.]

Action in the district court for Carver county to set aside certain conveyances, assignments of mortgages and transfer of stock. From an order, Morrison, J., overruling Katherine Hoeffken's demurrer to the complaint, she appealed. Affirmed.

William Furst, for appellant.

John J. Fahey, for respondent.

PER CURIAM.

The complaint avers the due recovery and docketing of a judgment by the plaintiff and against the defendant J. H. Hoeffken in the district court of Carver county on December 9, 1910, for $2,442.90, on a claim accruing prior to the conveyance and assignment hereinafter mentioned, and that before the bringing of this action the judgment was docketed in Itasca county. The complaint further alleges the issuance of an execution on the said judgment on December 9, 1910, out of the district court of Carver county, where the said defendant resided, and its return unsatisfied on December 13, 1910, and that the judgment remains wholly unsatisfied; that the defendant J. H. Hoeffken, in September, 1908, conveyed certain described tracts of land in Itasca county, and assigned certain described mortgages and stock, all then owned by him, without consideration, to his codefendant, this appellant; that such conveyance and assignment were made by said J. H. Hoeffken with intent to hinder, delay, and defraud the plaintiff in the collection of his claim; and that appellant took the said conveyance and assignment with full knowledge of such intent. Judgment is demanded, in the said complaint, declaring the said conveyance and assignment void as to the plaintiff.

The appellant, Katherine Hoeffken, interposed a general demurrer to this comp.aint, and the respondent moved for an order "overruling the demurrer as frivolous," and for judgment thereon, basing his motion on the pleadings and all the files and proceedings in the action. The court, after hearing both parties on the said motion, overruled the demurrer and granted leave to the appellant to answer. This is an appeal by her from such order.

The appellant argues that the motion was merely to strike out the demurrer as frivolous, and that it was not vulnerable upon such a motion; but we think that the court correctly determined that the application was for an order overruling the demurrer.

The appellant claims that the files in the cause of this plaintiff against the defendant J. H. Hoeffken conclusively show that the judgment upon which the present action is founded was obtained without jurisdiction and is void, and,

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further, that as the motion above referred to was based on "the pleadings and all the files and proceedings" in the action, it was the duty of the court to consider all the files in the action in which the said judgment was rendered, as well as the files in the present action, and to sustain the demurrer on this ground. This contention is without merit. The said motion was not based on the files of the action in which the said judgment was rendered. It is elementary that a demurrer will not lie, except for defects apparent upon the face of the pleading to which it is directed. If the said judgment is void, it is a matter of defense to be made by answer.

The further claim of the appellant that an execution should have issued in Itasca county prior to the bringing of this action is also without merit.

The court below was right in holding that the complaint stated a cause of action.

The order appealed from is affirmed.

JAMES GORDON v. NEW ENGLAND FURNITURE & CARPET COMPANY.[1]

May 10, 1912.

Nos. 17,507—(77).

Dismissal of action.

Action for conversion. The answer alleged that upon plaintiff's default in payment under a contract of sale, defendant took the property into its possession, and prayed that defendant be adjudged to have the possession of the property. *Held:* The trial court did not err in granting a motion to vacate the judgment entered and for an order dismissing the action. The answer did not present a counterclaim. [Reporter.]

Action in the district court for Hennepin county to recover $724 for conversion of household goods. The reply was a general denial. The case was tried before John Day Smith, J., who made findings and as conclusion of law ordered judgment in favor of defendant for $155. Plaintiff's motion to dismiss the action was granted, and defendant appealed from the order of dismissal. Affirmed.

[1] Reported in 135 N. W. 1135.

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Stevens & Stevens, for appellant.
M. A. Jordan, for respondent.

PER CURIAM.

Action for the conversion of personal property. Defendant interposed in defense that the property alleged to have been converted was long prior thereto conditionally sold to plaintiff by defendant, under a contract by the terms of which the title and ownership remained in defendant until the purchase price thereof was fully paid. Default in payment was alleged, and that by authority of the contract defendant took the property back into its possession. The demand for judgment was that plaintiff take nothing by the action and that defendant have judgment that it is the owner of the property and entitled to the possession of the same.

When the cause came on for trial, plaintiff attempted to dismiss the action; but defendant objected, and insisted upon the right to a determination of its ownership of the property as alleged in the answer, and in the absence of plaintiff's attorney, who was represented by some one not familiar with the case, who was requested to appear and ask for the dismissal, the court heard defendant's evidence and ordered judgment in its favor, which was subsequently entered. Thereafter, and owing to the absence from court of plaintiff's counsel and a misunderstanding as to the intention of plaintiff's attorney relative to the dismissal, the matter was taken before the court upon consent, and plaintiff's counsel was permitted to move to vacate the judgment and for an order of dismissal. This proceeding was informal and by the mutual consent of both parties. The motion was submitted, and the sole question presented was whether plaintiff, in view of the allegations of defendant's answer, could dismiss the action as a matter of right. The court held that he could, and ordered the judgment vacated and the action dismissed. Defendant appealed.

It is clear that the trial court was right. Defendant's answer did not present a counterclaim, but rather a justification for the alleged conversion. In other words, the answer simply confessed and avoided the alleged wrong. This did not preclude the right of plaintiff to dismiss.

Order affirmed.

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GUST PEARSON v. CHARLES NORLING.[1]

May 10, 1912.

Nos. 17,515—(68).

Master's duty in respect to instrumentalites.

Action for personal injury to servant caused by a defective ax handle in the hands of a fellow servant. *Held:* The master's duty is to use ordinary care in providing his servants with reasonably safe instrumentalities to work with. If the master knowingly furnishes defective tools to a servant and, while being carefully used, the tools break because of such known defect, and cause an injury to another servant ignorant of the fact that defective tools were furnished, an action lies in favor of the injured servant.

Action in the district court for St. Louis county to recover $2,325 for personal injuries. From an order, Dancer, J., overruling defendant's demurrer to the complaint, he appealed. Affirmed.

J. C. McGilvery and *W. G. Bonham*, for appellant.

Andrew Nelson and *George B. Sjoselius*, for respondent.

PER CURIAM.

The complaint, in this a personal injury action, alleged that plaintiff, employed in defendant's lumber camp, was injured by an ax used by another servant of defendant flying off its handle and cutting plaintiff severely in the knee. It is alleged that the injury was caused by defendant's negligence in failing to provide plaintiff's fellow servant with an ax having a suitable handle, and instead thereof providing such servant with an "ax whose handle was old, weak, cracked, and worn out, so that it was in great danger of breaking, and the said ax was in great danger of flying off from the broken handle when the said ax and handle were used in an ordinary manner by the said fellow servant; all of which facts were well known to the defendant but unknown to the plaintiff." A demurrer to the complaint was overruled, and defendant appeals.

[1] Reported in 135 N. W. 1134.

[Note] Liability of master for injury by defect in common tools, see note in 13 L.R.A.(N.S.) 668.

Duty of master to inspect tools or implements furnished servant, see note in 1 L.R.A.(N.S.) 944.

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The appellant's contention is that the master owed plaintiff, his servant, no duty of inspecting tools so simple and well understood as an ax; and if the ax handle was defective, the proximate cause of plaintiff's injury was the negligence of his fellow servant in failing to see the defect. The master's duty is to exercise ordinary care in providing his servants with reasonably safe instrumentalities to work with. If the master knowingly furnishes defective instrumentalities or tools to a servant, and such instrumentalities or tools while being carefully used by such servant break because of such known defect, and cause an injury to a fellow servant ignorant of the fact that defective instrumentalities or tools were furnished, it is plain that an action lies in favor of the injured servant. It matters not how simple the construction of the tool. The duty of inspecting simple tools which by use may become defective is not involved in this appeal.

The appeal is without merit, and the order is affirmed.

NILS NILSON v. CANADIAN NORTHERN RAILWAY COMPANY.

OLAF MATTSON v. SAME.

ERICK MATTSON v. SAME.

MANLY H. MORSE v. SAME.

JULIA LUNDE v. SAME.

WILLIAM C. KNUDSON v. SAME.[1]

May 10, 1912.

Nos. 17,690, 17,691—(240, 241).

Statutory costs.

Six actions against the same defendant for losses caused by the same fire. One cause was tried separately. The other five cases were thereafter tried under stipulation that they should be tried as one case but separate verdicts returned.

[1] Reported in 136 N. W. 280.

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There was only one appeal taken, and but one paper book and one brief filed. The same attorneys represented all the plaintiffs, and there was but one argument in this court. On appeal from the clerk's taxation of costs it was *held:* That the allowance of statutory costs in this court is a matter of discretion, and on the facts plaintiffs should be allowed as statutory costs no larger sum than $35, to be apportioned pro rata by the clerk to the plaintiffs in the several actions. [Reporter.]

Six actions begun in the district court for Roseau county, and transferred to Marshall county, to recover for damages to property caused by fire set by defendant's locomotive. The answers were a general denial. The cases were tried before Grindeland, J., and a jury which returned a verdict in favor of plaintiff in each case. From an order denying its motion in each case for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed in each case.

Hector Baxter and *Washburn, Bailey & Mitchell*, for appellant.

Charles Loring, Julius J. Olson and *Cooke & Berkman*, for respondents.

PER CURIAM.

In these six actions the plaintiffs seek to recover damages alleged to have been suffered by them from fire set by one of the defendant's locomotives on September 20, 1910, in Roseau county. The case in which Nils Nilson was plaintiff was tried before a jury. The other five cases were thereafter tried before one jury, under stipulation that they should be consolidated and tried as one case, the jury, however, to return separate verdicts. Each of the said plaintiffs had a verdict, and thereafter motions were made in all of the cases for judgment notwithstanding the verdict or for a new trial. The motions were denied, and appeals followed in all of the cases from the orders of the court therein entered.

The same fire is involved in all the cases, and the same witnesses testified concerning its origin. The evidence adduced by the defendant as to the condition, inspection, and operation of its locomotive, which is claimed to have set the fire, upon the day the fire was alleged to have been so set, is substantially the same as in the case of Babcock v. Canadian Northern Railway Company, supra, page 434. The defendant conceded that, if it should be held that the evidence in the Babcock cases on the question of the origin of the fire therein involved was sufficient to sustain the verdicts for the plaintiffs therein had, then there is sufficient evidence in the instant cases to support the verdicts herein.

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This question, and all others raised by the appellant herein, have, in the said Babcock cases, been determined adversely to the defendant, this appellant.

Orders affirmed.

On June 3, 1912, the following opinion was filed:

PER CURIAM.

Appeals by the plaintiffs from the clerk's taxation of costs. The plaintiffs claimed the right to tax $25 statutory costs in each of these six actions. The defendant objected to a greater allowance than $35.

The following facts in addition to those stated in the opinion filed herein indicate the questions involved:

Only one appeal was taken in these actions, and but one paper book was printed and one brief filed. The same attorneys represented all the plaintiffs, and but one argument was made in this court. In the court below the Nilson case was first tried to a jury, and the plaintiff had a verdict therein. Thereafter all of the other cases were tried together to one jury and separate verdicts for the several plaintiffs were returned.

The allowance of statutory costs in this court is a matter of discretion (rule 29), and we hold that on the facts the plaintiffs should be allowed as statutory costs the amount conceded by the defendant, viz., $35, and no further sum, to be apportioned pro rata by the clerk to the plaintiffs in the several actions.

It is so ordered.

HARRY A. BECK v. GREAT NORTHERN RAILWAY COMPANY.[1]

May 17, 1912.

Nos. 17,492—(97).

Directed verdict erroneous.

Action for personal injury. Plaintiff fireman claimed injury from a string of coal cars striking the engine. *Held:* As it did not conclusively appear that the servants handling the cars were free from fault, the court erred in directing a verdict in favor of defendant and in denying plaintiff's motion for a new trial. [Reporter.]

[1] Reported in 136 N. W. 1133.

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Action in the district court for Ramsey county to recover $26,700 for personal injuries.

Among other matters the complaint alleged that at the time of the accident the following statute (Laws 1906, c. 1) was in force in the state of Montana: "Every person or corporation operating a railway or railroad shall be liable for all damages sustained by any employee or employees thereof, and in consequence of the wilful wrongs either of omission or commission, of any other employee or employees thereof, when such neglect, mismanagement or wrongs are in any manner connected with the use and operation of any railway or railroad on or about which they shall be employed. No contract restricting such liability shall be legal and binding."

The answer admitted the accident on the date named, but denied negligence on defendant's part and alleged that the rights and liabilities of the parties were governed by the Federal "Employers Liability Act" and that the state act pleaded in the complaint was unconstitutional and that if it ever had validity it was superseded by the "Employers Liability Act." The reply was a general denial. Among other denials, it denied that the state act was unconstitutional or had been superseded by the Federal act. The case was tried before Kelly, J., who, when plaintiff rested, granted a motion to direct a verdict in favor of defendant. From the judgment entered pursuant to the verdict, plaintiff appealed. Reversed and new trial granted.

Thomas D. Schall, for appellant.

M. L. Countryman and *W. L. Clift*, for respondent.

PER CURIAM.

Action to recover for personal injuries. At the close of the evidence a verdict for defendant was directed by the court. Plaintiff appealed from an order denying a new trial.

The question is whether a case was made for the jury. Plaintiff was a fireman on an engine of defendant that hauled a freight train in Montana. His engine was being turned around on a Y at Rexford, Montana, and as it was about to go on the switch track a string of cars was kicked westerly on the track and struck the engine. Plaintiff jumped from the engine and claimed to have sustained injuries. The negligence charged was in permitting the string of cars to drift uncontrolled without notice or warning. The accident happened at night and it was dark. The only evidence was that of plaintiff. It is apparent that there was negligence somewhere. It is defendant's claim that this negligence was not in regard to the operation of the string of cars. We are unable to concur in this. We think that it did not conclusively appear that the servants charged with the duty of handling the string of cars were free from fault. We are of the opinion that the learned trial court should have left the case to the jury.

Order reversed and new trial granted.

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MARIA STEINGRUBE v. CITY OF ST. PAUL.[1]

May 17, 1912.

Nos. 17,521—(73).

Case followed.

Action in the district court for Ramsey county to recover $1,500, damages caused by the grading of a street. From an order, Dickson, J., sustaining plaintiff's demurrer to the fifth, sixth and seventh paragraphs of the answer, defendant appealed. Affirmed.

O. H. O'Neill and *J. P. Kyle*, for appellant.

John J. Kirby and *J. C. Michael*, for respondent.

PER CURIAM.

Appeal from an order sustaining a demurrer to certain defenses interposed to the answer, submitted on the same argument as the case of Hirsch v. City of St. Paul, supra, page 476, 136 N. W. 269.

Order affirmed.

MATHIAS URANY v. CITY OF ST. PAUL.[2]

May 17, 1912.

Nos. 17,522—(74).

Case followed.

Action in the district court for Ramsey county to recover $1,500, damages caused by the grading of a street. From an order, Dickson, J., sustaining plaintiff's demurrer to the fifth, sixth and seventh paragraphs of the answer, defendant appealed. Affirmed.

O. H. O'Neill and *J. P. Kyle*, for appellant.

John J. Kirby and *J. C. Michael*, for respondent.

[1] Reported in 136 N. W. 271.

[2] Reported in 136 N. W. 271.

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PER CURIAM.

Appeal from an order sustaining a demurrer to certain defenses interposed to the answer, submitted on the same argument as the case of Hirsch v. City of St. Paul, supra, page 476, 136 N. W. 269.

Order affirmed.

WOLFGANG SIXL v. CITY OF ST. PAUL.[1]

May 17, 1912.

Nos. 17,523—(75).

Case followed.

Action in the district court for Ramsey county to recover $1,500, damages caused by the grading of a street. From an order, Dickson, J., sustaining plaintiff's demurrer to the fifth, sixth and seventh paragraphs of the answer, defendant appealed. Affirmed.

O. H. O'Neill and *J. P. Kyle*, for appellant.

John J. Kirby and *J. C. Michael*, for respondent.

PER CURIAM.

Appeal from an order sustaining a demurrer to certain defenses interposed to the answer, submitted on the same argument as the case of Hirsch v. City of St. Paul, supra, page 476, 136 N. W. 269.

Order affirmed.

JOSEPH KOPPY v. CITY OF ST. PAUL.[2]

May 17, 1912.

Nos. 17,524—(76).

Case followed.

Action in the district court of Ramsey county to recover $1,500, damages caused by the grading of a street. From an order, Dickson, J., sustaining plain-

[1] Reported in 136 N. W. 271.

[2] Reported in 136 N. W. 271.

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tiff's demurrer to the fifth, sixth and seventh paragraphs of the answer, defendant appealed. Affirmed.

O. H. O'Neill and *J. P. Kyle*, for appellant.

John J. Kirby and *J. C. Michael*, for respondent.

PER CURIAM.

Appeal from an order sustaining a demurrer to certain defenses interposed to the answer, submitted on the same argument as the case of Hirsch v. City of St. Paul, supra, page 476, 136 N. W. 269.

Order affirmed.

HENNEPIN LUMBER COMPANY v. ALBERT L. PEDERSEN and Others.[1]

May 17, 1912.

Nos. 17,538—(94).

Mechanic's lien.

Action to foreclose a mechanic's lien. The evidence showed the house was practically completed in December, and the owner settled with the contractor, retaining about $60 to pay for screens which were delivered in February. In April the contractor ordered of plaintiff four small boards which were not needed. They were thrown down at the side of the house and left there, but afterwards taken away. The lien statement was filed July 6. *Held:* The trial court was fully justified in finding that the house was completed on January 20, that the delivery of the boards was an independent transaction between the contractor and plaintiff, and the lien was not filed within ninety days after the last item was furnished. [Reporter.]

Action in the district court for Hennepin county to recover $406.07; that the amount be adjudged to be a lien from and since June 18, 1909, against the premises superior and paramount to the claims of defendants therein and that the premises be sold to satisfy the lien. When plaintiff rested defendant moved that the action be dismissed. The motion was overruled. The case was tried before Hale, J., who made findings and as conclusions of law found that the lien right of plaintiff had expired on July 6, 1910, and that defendant Albert L. Pedersen

[1] Reported in 136 N. W. 1134.

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was entitled to the decree of court that the lien statement be discharged from the records. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Walter Holsinger, for appellant.

Alvord C. Egelston and *Edward T. Teitsworth*, for respondent.

PER CURIAM.

This action was brought to foreclose a mechanic's lien for materials furnished in the erection of a house. The defense was that the lien was not filed within ninety days after the last item was furnished. The trial court upheld this defense and decided the case for defendants. Plaintiff appealed from the judgment entered pursuant to this decision.

The case was correctly decided. The evidence showed that the house was practically completed in December, 1909. The owner settled with the contractor and occupied the house. He retained about $60 to pay for screens which the contractor delivered in February. On April 9, eleven days before the time for filing a lien expired the contractor ordered and plaintiff delivered to the premises four small boards. The evidence is clear that they were not needed; they were thrown down by the side of the house and left there, but afterwards taken away. The date when the last item of materials was furnished was January 20. The lien statement was filed July 6. The trial court was fully justified in finding that the construction of the house was fully completed January 20, and that the delivery of the boards in April was an entirely independent transaction between plaintiff and the contractor.

Judgment affirmed.

RUTH DORAN v. JOHN A. KENNEDY and Others.[1]

May 24, 1912.

Nos. 17,477—(87).

Decision not appealable.

Findings of fact and conclusions of law in plaintiff's favor were filed on September 30. No motion for a new trial was made and no judgment entered. Appeal from the "order" of September 30. *Held:* The order or decision of the trial court was not appealable. [Reporter.]

[1] Reported in 136 N. W. 1134.

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Action in the district court for Koochiching county to determine adverse claims to certain real estate. The case was submitted upon the pleadings, and the admissions made by both parties in open court, to Stanton, J., who, disregarding the form of plaintiff's motion for judgment on the pleadings and determining the action on the merits, made findings and as conclusion of law found that plaintiff was the owner of the premises, but did not add any order for judgment. From the "order" granting motion for judgment on the pleadings, "with the admissions as to the pleadings," in favor of plaintiff, defendants appealed. Dismissed.

F. J. McPartlin, for appellant.

William E. Culkin and *John E. Samuelson*, for respondent.

PER CURIAM.

Action to determine adverse claims to land in Koochiching county. On the trial certain admissions were made, and plaintiff moved for judgment on the pleadings and admissions. This motion was taken under advisement by the trial court, and on September 30, 1911, findings of fact and conclusions of law in plaintiff's favor were made and filed. No motion for a new trial was made and no judgment entered. This appeal was taken from the "order" of September 30. It is entirely clear that the order or decision of the trial court was not appealable. Though no motion was made to dismiss the appeal, and though respondent does not make the point, we must refuse to take jurisdiction, as we are clearly without it.

The appeal is dismissed.

S. F. BOWSER & COMPANY v. F. J. KOTSMITH.[1]

May 24, 1912.

Nos. 17,501—(92).

Vacating judgment.

An order vacating an order for judgment, and reinstating the cause for trial upon the issues made by the pleadings, was within the discretion of the court, and no abuse of discretion appeared. [Reporter.]

[1]Reported in 136 N. W. 1135.

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Appeal by plaintiff from an order of the district court for Benton county, Nye, J., vacating and setting aside the judgment theretofore ordered, upon defendant's default, and reinstating the cause upon the calendar for trial. Affirmed.

James E. Jenks, for appellant.

J. D. Sullivan, for respondent.

PER CURIAM.

Appeal from an order vacating an order for judgment and reinstating the cause for trial upon the issues made by the pleadings. An examination of the record presents no sufficient reasons for a reversal. The order appealed from was within the discretion of the trial court, and we are unable to say that the discretion was abused.

Order affirmed.

I. N. HILL v. CHARLES E. GLASSPOOLE and Another.[1]

May 24, 1912.

Nos. 17,527—(100).

Action against corporation — complaint sufficient.

Action against a corporation for commission upon sale of certain land. The complaint alleged that defendant G, for himself and the corporation, promised to pay plaintiff, that the corporation adopted plaintiff's previous employment as agent to sell, and a contract made a part of the complaint showed that G at the time was president of the corporation. *Held:* A demurrer to the complaint by each defendant was properly overruled. [Reporter.]

Action in the district court for Ramsey county against Charles E. Glasspoole and the St. Paul Land Company to recover $11,400 commission alleged to be due upon a sale of land. From orders, Kelly, J., overruling their separate demurrers to the complaint, defendants appealed. Affirmed.

John D. O'Brien and *Clapp & Macartney*, for appellants.

B. H. Schriber, for respondent.

PER CURIAM.

A complaint for commission upon sale of twelve thousand acres of land set out, with great particularity, how plaintiff had been employed by the defendant

[1] Reported in 136 N. W. 261.

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Glasspoole and another; that Glasspoole bought out the one interested with him in the sale of large tracts of land in Montana; that although plaintiff made efforts to negotiate sales, none were consummated under two written contracts of employment set out; that then the defendant corporation was formed to take over Glasspoole's interest, and he became the principal stockholder therein. Thereupon plaintiff was continued as agent; the allegation being that the corporation adopted plaintiff's employment. Finally it is alleged that plaintiff procured one Rodgers to go to Montana and investigate the land, and in order to induce Rodgers to purchase twelve thousand acres thereof, it is alleged that the defendant Glasspoole requested plaintiff to buy one section of said twelve thousand acres at $25 per acre, that if plaintiff did, Rodgers would purchase, and the defendants would thereupon pay plaintiff one dollar per acre commission, $1,000 thereof would be paid at the time of the transaction and the balance thereafter, so that plaintiff might use it to pay for the section to be bought. It is further alleged this was carried out, a contract executed by the defendant corporation to Rodgers for the sale of twelve thousand acres, upon which has been paid more than $50,000, and one contract from Rodgers to plaintiff for the sale of said one section at $25 per acre, upon which the defendants allowed Rodgers a credit on his contract with it for $1,000 to be applied on plaintiff's contract.

The defendants demurred separately to the complaint. The demurrers were overruled.

No serious contention is made that the complaint does not state a cause of action as to Glasspoole. The only excuse for interposing a demurrer by the corporation is that there is a failure to aver authority in Glasspoole to act for the corporation. The allegation is that Glasspoole, for himself and the corporation, promised to pay plaintiff; also, that the corporation adopted plaintiff's previous employment as agent to sell; and further, a contract, made a part of the complaint, shows that Glasspoole at the time was the president of the corporation. The demurrer of each defendant was properly overruled.

Order affirmed.

GOLDA COHN v. FREDERICK BRINKMANN.[1]

May 24, 1912.

Nos. 17,543—(109).

Specific performance.

Held: The complaint in an action for specific performance of a contract to

[1] Reported in 136 N. W. 1133.

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convey real estate did not state a cause of action for the relief asked or for any other relief. Plaintiff's "interest" in the land she was to convey to defendant was lost, but not through any breach of the contract by defendant. [Reporter.]

Action in the district court for Hennepin county for the specific performance of a contract for the exchange of real estate. The case came on for trial before Dickinson, J., and upon motion of defendant the action was dismissed on the ground the complaint did not state facts sufficient to constitute a cause of action. From the judgment entered pursuant to the order of dismissal, plaintiff appealed. Affirmed.

Lester W. Crawhall and *Winthrop & Crawhall*, for appellant.

G. A. Westphal and *Ernest W. Lonquist*, for respondent.

PER CURIAM.

This is an action for specific performance of a contract to convey real estate in Minneapolis. On the trial, defendant objected to the introduction of any evidence on the ground that the complaint did not state a cause of action. This objection was sustained, and the case dismissed. Judgment was entered, and plaintiff appealed.

The question before us is whether a cause of action is stated in the complaint. A statement of its allegations would be of no value. We are satisfied after a careful examination, that the complaint shows on its face that plaintiff is entitled to no relief.

The contract was for an exchange of properties. Plaintiff's "interest" in land in Wilkin county that she was to convey to defendant in exchange for the lot in Minneapolis, was merely the right to a deed from the owner of the land on the payment of some $6,600 on or before July 20, 1910. It was apparently contemplated that part of this money should be raised on mortgages to be given by plaintiff on the Minneapolis property after it was conveyed to her by defendant. But the complaint shows that plaintiff's interest in the Wilkin county land disappeared on July 20, and not, as we view the complaint, through any breach of the contract by defendant. The mortgages provided for by the contract were not given, and plaintiff lost all interest in the land she agreed to convey to defendant. To decree specific performance under these conditions would be to give plaintiff a valuable property for nothing whatever in return. Certainly a court of equity will refuse its aid to such a result. The complaint fails to state a cause of action for the relief asked or for any other relief.

Affirmed.

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CHRIS C. JORGENSBURG v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

May 24, 1912.

Nos. 17,610—(108).

Vacating judgment — no abuse of discretion.

Motion to vacate an order for dismissal of an action, pursuant to a stipulation between plaintiff and defendant's attorneys, and the judgment entered thereon. *Held:* The order was a discretionary one and there was no abuse of discretion in vacating the judgment of dismissal. Letters of plaintiff's attorney to the judge and defendant's attorney announcing his abandonment of a former motion to set aside the stipulation was not a waiver of his right to apply to the court to be relieved from the judgment thereafter entered upon the stipulation. [Reporter.]

Action in the district court for Douglas county to recover $35,500 for personal injuries received while a passenger upon defendant's train. From an order, Nye, J., vacating an order for judgment and a judgment entered thereon, defendant appealed. Affirmed.

John L. Erdall, C. J. Gunderson, L. K. Eaton and *Alfred H. Bright*, for appellant.

Thomas D. Schall, for respondent.

PER CURIAM.

This is an appeal from an order of the district court for Douglas county vacating a former order for judgment of dismissal and the judgment entered thereon.

The facts are these: Plaintiff brought this action in June, 1911, to recover damages for personal injuries. September 5, 1911, plaintiff and a claim agent of defendant signed a stipulation reciting that the cause of action had been settled, providing that the case should be dismissed with prejudice, and requesting the court to enter an order of dismissal. Immediately thereafter plaintiff, through his attorneys, moved for an order setting aside this stipulation for dismissal and reinstating the case on the calendar for trial. This motion was heard by the court on affidavits, and taken under advisement. Before it was decided, plaintiff's attorney notified the judge and defendant's attorneys that he abandoned the motion. On November 9, 1911, the court, on the ex parte appli-

[1] Reported in 136 N. W. 1134.

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cation of defendant, ordered that the action be dismissed, pursuant to the stipulation. Judgment of dismissal was entered December 1. Meanwhile plaintiff brought suit in the Federal court on the same cause of action. Defendant answered setting up this stipulation and order for dismissal on the merits in the state court as a bar. It was at this point that plaintiff realized the difficulty in escaping the effect of the order, and made the motion to vacate it and the judgment entered thereon, from the order granting which motion this appeal is taken.

The order was a discretionary one, and the showing made was sufficient to make it clear that there was no abuse of discretion in vacating the judgment of dismissal. We cannot sustain defendant's point that the letters to the judge and to defendant's attorney announcing plaintiff's abandonment of his motion to set aside the stipulation, amounted to a waiver of his right to apply to the court upon a proper showing to be relieved from the judgment thereafter entered on the stipulation. Nor is there any merit in the technical objection that the guardian that had been appointed for plaintiff after the settlement was not made a party to the application to vacate the judgment.

Order affirmed.

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ACCORD AND SATISFACTION.

The rule that, where the amount of a debt is undisputed, the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire debt, is not a satisfaction, because the agreement is without consideration, followed and applied.

—Foster County State Bank v. Lammers, 94.

It is not a consideration for an agreement to accept a less sum in satisfaction of the whole amount due on a promissory note that the maker agrees after maturity of the note to pay such lesser sum at a place other than that specified in the note.

—Foster County State Bank v. Lammers, 94.

The facts pleaded and offered to be proved by defendants did not bring the case within any of the exceptions to the rule above stated.

—Foster County State Bank v. Lammers, 94.

An agreement by makers of the note, other than one who was insolvent, to induce the insolvent to pay his share or to furnish him the money to pay it, is not a consideration for an agreement by plaintiff payee to accept a less sum in satisfaction of the whole amount due on the note, and an offer on behalf of all the defendants to prove these facts was properly excluded.

—Foster County State Bank v. Lammers, 97.

ACCOUNT STATED.

In this action to recover on an account stated, it is *held* that the evidence supports the verdict in favor of plaintiff, and that there was no error in the rulings on the trial.

—Archer v. Whitten, 122.

ACTION.

A complaint alleging that the defendant, at a certain time, had and re-

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ACTION—Continued.

ceived a sum of money from plaintiff, which he then agreed to repay to plaintiff upon demand, states a cause of action for money loaned, and not for money had and received.

—Farrington v. Farrington, 272.

Separate causes of action *held* not improperly united in the complaint.

—Venner v. Great Northern Railway Co. 447.

ADVERSE POSSESSION.

Action to recover possession of land in the city of Duluth, the record title to which was in the plaintiffs, and defendant claimed title by adverse possession only. The verdict awarded the possession of only a small portion of the premises to the plaintiffs, and they made a motion for judgment notwithstanding the verdict or a new trial. The motion for judgment was denied, and a new trial granted. Both parties appealed. *Held*, that the motion for judgment was correctly denied, and the new trial rightly granted, for the failure of the court to give the plaintiffs' requested instruction to the effect that failure to pay taxes tends strongly to prove lack of claim of title.

—Peters v. Tackaberry, 373.

APPEAL AND ERROR.

The four justices who heard the argument being equally divided in opinion, the order of the trial court was affirmed without costs.

—Jordan v. Northwestern Electric Equipment Co. 522.

Where the justices of this court are equally divided in opinion, and the order appealed from is affirmed for that reason, the decision is not a precedent in any other case.

—Jordan v. Northwestern Electric Equipment Co. 210.

Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 233.

The instructions to the jury examined, and found not prejudicial to defendant, in view of the issue made by the pleadings and evidence.

—Farrington v. Farrington, 272.

SECOND APPEAL.

Where an appeal is taken from an order denying a new trial, and the order is affirmed, either on the merits, or on an equal division in opin-

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APPEAL AND ERROR—Continued.

ion of the justices, or under the rules of court, no questions, which were or might have been determined on such appeal, can be raised on a subsequent appeal from the final judgment. But such is not the effect of a mere dismissal of the appeal.

—Jordan v. Northwestern Electric Equipment Co. 209.

Action for personal injury. Injury in February, 1909. First trial in November, 1909. Appeal from order denying a new trial decided March, 1911. Second trial in June, 1911. The lapse of time between the accident and the second trial is alone sufficient to make the case different from the case presented on the first trial, had before it was possible to judge whether plaintiff's injuries were permanent or could be cured or helped by treatment.

—Landro v. Great Northern Railway Co. 307.

WHEN APPEAL CAN BE TAKEN.

That part of an order which denies a motion to amend the conclusions of law is not appealable.

—Clark v. Thorpe Brothers, 204.

Findings of fact and conclusions of law in plaintiff's favor were filed on September 30. No motion for a new trial was made and no judgment entered. Appeal from the "order" of September 30. *Held:* The order or decision of the trial court was not appealable.

—Doran v. Kennedy, 535.

ASSIGNMENTS OF ERROR.

Where exceptions taken on the trial are relied on as the basis of assignments of error they ought to be construed with greater liberality since the enactment of Laws 1901, p. 121, c. 113, than they were before that act.

—Peters v. Tackaberry, 378.

REVIEW.

Failure of the court to give a full and complete definition of negligence in the charge cannot be taken advantage of upon appeal, where no assignment of error is predicated thereon in the motion for a new trial.

—Torkelson v. Minneapolis & St. Louis Railroad Co. 73.

The rulings of the court upon the reception of evidence, and thereafter withdrawing the same from the consideration of the jury on defendant's motion, examined, and found without prejudice or error.

—Moore v. Fisher, 339.

Where the trial court grants a new trial on the ground that its instructions to the jury were misleading and prejudicial to the moving party, much must be left to the sound judgment of the trial court, and the

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APPEAL AND ERROR—Continued.

order will be reversed only when it appears that the conclusion of the trial court was clearly without substantial foundation.

—Hartikka v. D. G. Cutler Co. 344, 347.

Where a request to charge the jury was modified by the trial judge and then given, and at the close of the charge plaintiff's counsel excepted "to those requests of ours that are not given," and there was no other exception to the refusal to give the instructions, *held:* The objection to the exception was purely technical, for the record shows that the action of the trial court in modifying the requested instruction was deliberately and understandingly taken, and the correctness of the ruling in refusing the requested instruction may be reviewed on appeal.

—Peters v. Tackaberry, 377, 378.

Where an application to open a default is denied by the trial court, such action will not be disturbed on appeal, unless the record discloses an abuse of discretion in passing upon, not only the excuse for the default, but also upon the good faith and merit in the claim sought to be asserted by the applicant. The record examined and held not to show reversible error.

—Southern Minnesota Investment & Loan Co. v. Livingston, 421.

FINDINGS OF FACT.

Action to recover earnest money paid on an executory contract for the purchase of real estate, on the ground that the plaintiff was induced to enter into the contract by the alleged fraudulent representation of the defendant as to the amount of the taxes per year on the property. *Held*, if findings of fact are so uncertain that it is impossible to tell, by reference to the pleadings, what the court intended to find, they are not sufficient to sustain a judgment; but if such intention can be ascertained by reference to the pleadings, the objection that the findings are not sufficiently specific cannot be raised for the first time on appeal, the remedy being a motion to make them more specific.

—Clark v. Thorpe Brothers, 202.

ARSON.

In view of our statutes in reference to the property of a married woman, it is arson when a man burns his wife's property.

—State v. Roth, 408.

In a prosecution for burning a building which belonged to the defendant's wife, evidence relating to the insurance upon the building was clearly admissible to show motive.

—State v. Roth, 408.

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ASSAULT AND BATTERY.

In this, an assault and battery case, where the evidence authorized the jury to find that the assault was unprovoked, or that excessive force was used upon slight provocation, plaintiff was entitled to an instruction that, in the discretion of the jury, punitive damages may be included in the verdict.

—Moore v. Fisher, 339.

Upon the evidence the court properly refused to instruct the jury that plaintiff could not recover for impaired hearing occasioned by the assault.

—Moore v. Fisher, 339.

In this action a verdict of $500, which may have included, not only damages for physical and mental pain temporarily resulting from the assault, but also for impaired hearing and punitive damages, *held* not so excessive as to indicate that it was prompted by passion or prejudice.

—Moore v. Fisher, 339.

ASSIGNMENT.

A claim for damages for the destruction of personal property by fire is assignable.

—Babcock v. Canadian Northern Railway Co. 434.

In an action for injury and destruction of personalty by a fire alleged to have been set by defendant's locomotive, evidence *held* sufficient to show an assignment of the property owner's claim for such injury and destruction to the plaintiffs.

—Babcock v. Canadian Northern Railway Co. 434.

ATTORNEY AND CLIENT.

A contract of employment between an attorney and his client, whereby the client is prohibited from settling his cause of action unless the attorney consents thereto, is contrary to public policy and void.

—Burho v. Carmichiel, 211.

A clause in such contract wherein the client agrees not to employ any other attorney to present, prosecute, or collect the claim, and not to settle the claim except through the attorney named in the contract, is *held* to be an attempt to prohibit the client from settling without the consent of the attorney, and to vitiate the entire contract.

—Burho v. Carmichiel, 211.

BANK AND BANKING.

When a stock certificate is pledged with a bank, the act of an officer thereof in wrongfully appropriating the same for his own purposes is

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BANK AND BANKING—Continued.

not the misappropriation of the bank to whose custody it was intrusted, even though the bank may be liable to the pledgor.

—Schumacher v. Greene Cananea Copper Co. 124.

CONSTITUTIONAL LIABILITY OF STOCKHOLDER.

The stockholder's liability created by Const. art. 10, § 3, constitutes a reserve or trust fund for the benefit of creditors, and is enforceable only in sequestration or insolvency proceedings, in which all creditors are afforded an opportunity to be heard. Allen v. Walsh, 25 Minn. 543, followed and applied.

—Northwestern Trust Co. v. Bradbury, 83.

The liability is not discharged by the payment of an assessment upon the stock levied pursuant to orders given by the public examiner, acting under the provisions of section 3000, R. L. 1905; the assessment having been ordered on account of an impairment of the bank's funds, and to enable it to reopen its doors and continue its banking business.

—Northwestern Trust Co. v. Bradbury, 83.

The sole purpose of that statute was to vest in the public examiner supervisory control over banking institutions, and by timely action to prevent the impairment of their funds, to the injury and loss of depositors and others, and to keep and maintain them so far as practicable upon a safe and sound financial basis.

—Northwestern Trust Co. v. Bradbury, 91.

Nor will the voluntary payment by a stockholder of the full quota of his liability to a particular creditor of the corporation relieve him from the payment of an assessment duly made in liquidation proceedings.

—Northwestern Trust Co. v. Bradbury, 83.

BANKRUPTCY.

Under section 67e of the bankruptcy act of 1898 [30 St. 564, c. 541] a trustee in bankruptcy cannot avoid a conveyance executed and delivered by the bankrupt more than four months prior to the filing of the petition, though such conveyance is filed for record within the four months period. For a conveyance is made when it is delivered.

—Underleak v. Scott, 136.

Under section 70e of the bankruptcy law of 1898 [30 St. 566, c. 541] the trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided under the common law or the statutes of the state, whether such transfer is made within four months prior to the filing of the petition or not.

—Underleak v. Scott, 136.

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BILLS AND NOTES.

It is settled by our decisions that a bill of exchange or draft, payable generally, and not out of any particular fund or debt, will not amount, before acceptance, to an assignment to the holder of funds in the hands of the drawee belonging to the drawer, or of a debt due from the former to the latter.

—Wasgatt v. First National Bank of Blue Earth, 12.

It is settled by our decisions that a draft for the whole of a particular specified fund or debt, or a check on a bank for the whole of the fund on deposit to the credit of the drawer, amounts in equity to an assignment of such fund or debt, even without acceptance.

—Wasgatt v. First National Bank of Blue Earth, 12.

BANK CHECK.

A check on a bank in which the drawer has funds subject to check is an assignment of such funds of the drawer to the amount of the check, which assignment is complete as between the drawer and payee when the check is given, and complete as between the payee or holder and the bank when the check is presented for payment. Upon such presentation, the bank, unless its right to pay has been taken away by some occurrence before presentation, is legally bound to pay the check.

—Wasgatt v. First National Bank of Blue Earth, 9.

The objection that there is no privity between the bank and the payee or holder of the check is without substance under the modern rule that a person in whose favor a contract is made may sue upon it, though not a party to it, and such objection entirely disappears when the check is presented for payment. By that act the payee and the bank are brought in privity, and the right of the payee against the bank is complete.

—Wasgatt v. First National Bank of Blue Earth, 13.

CONSIDERATION.

There being no basis, legal or otherwise, for a proposed contest of a will, *held*, that the agreement to refrain from contesting the will was not a legal or valid consideration for the promissory notes given by defendants in consideration of the agreement.

—Montgomery v. Grenier, 416.

CANCELATION.

One of the defendants drew pen and ink lines through the signatures of three defendants, but this was done without the knowledge or consent of the payee. *Held*, this did not cancel the note as to them.

—Foster County State Bank v. Lammers, 98.

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BILLS AND NOTES—Continued.

ACTION—PLEADING.

Action upon a promissory note. The answer alleged that one of the defendants had "a dispute and a counterclaim * * * to this demand against him." *Held:* The allegation was insufficient to show such a bona fide dispute or counterclaim as would bring the case within the rule that an agreement to accept a sum less than the entire claim in full payment of an unliquidated demand, or one in which there is a bona fide dispute, is valid.

—Foster County State Bank v. Lammers, 98.

BOUNDARY.

Errors, mistakes, and ambiguities appearing in a recorded plat of lots and blocks, respecting the size and dimensions of the lots platted and the width of streets thereby laid out, may be corrected and explained by a reference to the monuments placed in the ground by the surveyor at the time of surveying and platting the land.

—Arms v. City of Owatonna, 20.

This rule is in no way changed by G. S. 1878, c. 29, § 5, (in force when the plat in question was filed) which declared that every grant or dedication to the public noted upon a plat should be deemed in law and equity a conveyance of the same to the public.

—Arms v. City of Owatonna, 23.

A particular street in such a plat was designated as forty feet wide. It is *held* that the trial court was justified by the evidence in finding such designation an error or mistake, and that the street was in fact, as shown by the monuments placed in the ground by the surveyor, fifty feet wide. The other findings were supported by the evidence.

—Arms v. City of Owatonna, 20.

BRIDGE.

Section 2, c. 378, p. 528, Laws 1911, authorizes the city council of cities of the fourth class to require the county board to appropriate money from the county road and bridge fund for the building or improving of bridges on such city streets only as the county board may have designated as state roads or highways.

—State ex rel. v. County of Freeborn, 361.

BROKER.

An "exclusive agency" to sell property is not equivalent to an "exclusive right to sell." Where an exclusive agency only is granted, the owner retains the right to sell the property himself, without being liable

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BROKER—Continued.

to the agent for a commission. Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L.R.A. 720, followed and applied.

—Smith v. Preiss, 392.

CARRIER.

Failure of the plaintiff, in an action for damages against a railroad company for failure to furnish cars, to allege an express contract for such cars, does not bring the case within the operation of Laws 1907, p. 25, c. 23, known as the reciprocal demurrage law, and a recovery may be had, as at common law, without alleging any written demand for the cars.

—Zetterberg v. Great Northern Railway Co. 495.

This law does not diminish the common-law rights of shippers, but gives them additional statutory rights when its provisions have been complied with.

—Zetterberg v. Great Northern Railway Co. 495.

TRANSPORTATION OF LIVE STOCK.

In an action against a common carrier to recover for injuries to horses while in transit, alleged generally to have been caused by rough and negligent handling by defendant, a presumption of negligence arises when plaintiff proves delivery to the carrier in good condition and receipt at destination in an injured condition.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 33.

The fact that the owner or his agent accompanies the horses relieves the carrier from special care and oversight of the animals, but does not change the presumption, unless it is shown that the injury was caused by the negligence of the owner or his agent. The verdict in this case *held* sustained by the evidence.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 33.

There were no errors in the rulings on the admission of evidence, in the instructions to the jury, or in the refusal to give instructions requested.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 33.

Action to recover damages occasioned by the alleged negligence of the defendant in unreasonably delaying the transportation of plaintiff's live stock. Verdict in favor of plaintiff. *Held*, that the trial court erred in instructing the jury as to the claimed negligence of the defendant in the movement of its trains before the plaintiff's stock was received for transportation.

—Clements v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 99.

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CARRIER—Continued.

LIMITATION OF LIABILITY.

Where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the value so agreed upon will be the limit of recovery. In this case it is held that the evidence does not show that the shipper and carrier agreed on the valuation of the horses.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 33.

TRANSPORTATION OF GOODS.

In this action to recover damages caused by freezing to a carload of holly while being transported over defendants' railways, it is *held:*

1. There was evidence to sustain a finding that the holly was in good condition when delivered to the initial carrier for shipment.
2. Proof of this fact, and that the holly was frozen and thereby damaged on its arrival at destination, made a prima facie case, and the burden of proof was on defendants to show that the freezing was not due to negligence on their part.
3. Defendants failed to sustain this burden.

—B. Pressley Co. v. Illinois Central Railroad Co. 399.

It is well settled in this state that the rule as to what constitutes a prima facie case applies to perishable freight. The carrier is not an insurer, but he has the burden of proof.

—B. Pressley Co. v. Illinois Central Railroad Co. 401.

TRANSPORTATION OF PASSENGERS.

Action for personal injury received, while a passenger on defendant's train, in a fight with a colored cook. *Held*, that the evidence justified the submission of the question of exemplary damages to the jury, and that the award of damages ($1,100) is not so large as to justify a reversal of an order denying a new trial.

—Germann v. Great Northern Railway Co. 310.

Action to recover damages for wrongful ejection from a street car. *Held*, that an award of damages in the sum of $150 is excessive, and that a new trial be granted, unless the plaintiff consents to reduce the verdict to $100.

—Glewwe v. St. Paul City Railway Co. 471.

CASES DISTINGUISHED.

Beecher v. Stephens, 25 Minn. 146.

—Olsen v. Bibb Co. 217.

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—Aho v. Adriatic Mining Co. 508.

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—Laird Norton Yards v. City of Rochester, 119.

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—Laird Norton Yards v. City of Rochester, 120.

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—MacKinnon v. City of Minneapolis, 263.

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—MacKinnon v. City of Minneapolis, 263.

Hull v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 116 Minn. 349, 133 N. W. 852.
—Dorffi v. Duluth, Winnipeg & Pacific Railroad Co. 277.

Hunt v. Roosen, 87 Minn. 68, 91 N. W. 259.
—Northwestern Trust Co. v. Bradbury, 91.

Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569.
—Laird Norton Yards v. City of Rochester, 120.

Jordan v. White, 20 Minn. 77 (91).
—Evans v. Northern Pacific Railway Co. 9.

Jungblum v. Minneapolis, N. U. & S. W. Ry. Co. 70 Minn. 153, 72 N. W. 971.
—Evans v. Northern Pacific Railway Co. 8.

Leland v. School District, 77 Minn. 469, 80 N. W. 354.
—Laird Norton Yards v. City of Rochester, 121.

Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856.
—Babcock v. Canadian Northern Railway Co. 445.

Magliani v. Minnesota Transfer Ry. Co. 108 Minn. 148, 121 N. W. 635.
—Torkelson v. Minneapolis & St. Louis Railroad Co. 77.

Metz v. St. Paul City Ry. Co. 88 Minn. 48, 92 N. W. 502.
—Bodin v. Duluth Street Railway Co., 516.

Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591.
—Montgomery v. Grenier, 420.

Minneapolis S. & D. Co. v. Great Northern Ry. Co. 83 Minn. 370, 86 N. W. 451.
—Babcock v. Canadian Northern Railway Co. 439.

Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 N. W. 391.
—Foster v. Gage, 501.

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—Northwestern Trust Co. v. Bradbury, 89.

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—Northwestern Trust Co. v. Bradbury, 89.

Runyon v. Alton, 78 Minn. 31, 80 N. W. 836.
—Mueller v. Supervisors of Town of Courtland, 293.

Shute v. Princeton Township, 58 Minn. 337, 59 N. W. 1050.
—Carlton County Farmers Mutual Fire Insurance Co. v. Foley Brothers, 66.

Sours v. Great Northern Ry. Co. 84 Minn. 230, 87 N. W. 766.
—Torkelson v. Minneapolis & St. Louis Railroad Co. 77.

State ex rel. v. Minnesota Southern R. Co. 18 Minn. 21 (40).
—State ex rel. v. St. Paul City Railway Co. 322.

Thayer v. Estate of Pray, 111 Minn. 451, 127 N. W. 392.
—Montgomery v. Grenier, 420.

Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104.
—Bemis v. Northwestern Trust Co. 413.

Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187.
—MacKinnon v. City of Minneapolis, 263.

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—Montgomery v. Grenier, 420.

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—La Pray v. Lavoris Chemical Co. 155.

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—Moore v. Fisher, 342.

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—Mueller v. Supervisors of Town of Courtland, 294.

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—Foster County State Bank v. Lammers, 97.

Carner v. Chicago, St. P., M. & O. Ry. Co. 43 Minn. 375, 45 N. W. 713.
—Babcock v. Canadian Northern Ry. Co. 441.

Cooke v. Iverson, 108 Minn. 388, 397, 122 N. W. 251, 254.
—State ex rel. v. City of Mankato, 463.

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—Foster County State Bank v. Lammers, 97.

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—English v. Minneapolis & St. Louis Railroad Co. 135.
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—Torkelson v. Minneapolis & St. Louis Railroad Co. 78.
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—Burmeister v. Gust, 253.
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—Babcock v. Canadian Northern Railway Co. 438.
Kelly v. City of Faribault, 83 Minn. 9, 85 N. W. 720.
—State ex rel. v. Minnesota Tax Commission, 162.
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—Evans v. Northern Pacific Railway Co. 9.
Lauritsen v. American Bridge Co. 87 Minn. 518, 92 N. W. 475.
—English v. Minneapolis & St. Louis Railroad Co. 135.
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—Nelson v. Halvorson, 255, 258.
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—Evans v. Northern Pacific Railway Co. 4, 7, 8.
McKusick v. Seymour, Sabin & Co. 48 Minn. 158, 50 N. W. 1114.
—Northwestern Trust Co. v. Bradbury, 89.
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—Foster County State Bank v. Lammers, 97.

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—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14, 17.

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—State ex rel. v. Fitzgerald, 194.

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—Foster County State Bank v. Lammers, 97.

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—Hartikka v. D. G. Cutler Co. 347.

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Smith v. County of Nobles, 37 Minn. 535, 35 N. W. 383.
—State ex rel. v. Minnesota Tax Commission, 162.

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—State ex rel. v. Minnesota Tax Commission, 162.

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—Wood v. Johnson, 268.

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—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 230, 232.

Winnebago Paper Mills Co. v. Northwestern Printing & Pub. Co. 61 Minn. 373, 63 N. W. 1024.
—Northwestern Trust Co. v. Bradbury, 89.

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White v. Minneapolis & R. R. Ry. Co. 111 Minn. 167, 126 N. W. 533.
—B. Pressley Co. v. Illinois Central Railroad Co. 401.

CASE OVERRULED.

Dodge v. Minnesota Plastic Slate Roofing Co. 16 Minn. 327 (368).
—Northwestern Trust Co. v. Bradbury, 88.

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CERTIORARI.

An order of the district court directing a county attorney to allow a person under indictment for the crime of arson to inspect his testimony taken before the fire marshal of the state, for the purpose of making a motion to quash the indictment, is reviewable on a writ of certiorari.

—State ex rel. v. Steele, 384.

CONSTITUTION.

CONSTRUCTION.

Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men.

—State ex rel. v. City of Mankato, 465.

The provisions of a state constitution do not confer any powers upon the legislature, but are mere limitations, and the legislature has all the powers of an absolute sovereign of which it has not been deprived by the constitution.

—State ex rel. v. City of Mankato, 458.

Constitutional provisions being mere limitations, the question to be considered, in determining whether a particular act of the legislature violates a particular constitutional provision, is not whether the people, in adopting such provision, had in mind the act of the legislature in question, and were attempting to authorize it, but whether, having in mind the possibility of some future attempt on the part of the legislature to enact such an act, they were attempting to frustrate it in advance.

—State ex rel. v. City of Mankato, 458.

When the language of the constitution is positive and free from all ambiguity, courts are not at liberty, by a resort to the refinements of legal learning, to restrict its obvious meaning. Cooke v. Iverson, 108 Minn. 388, 397, 122 N. W. 251, 254.

—State ex rel. v. City of Mankato, 463.

DIVISION OF POWERS OF GOVERNMENT.

Const. art. 3, providing that the powers of government shall be divided into executive, legislative, and judicial, etc., does not apply to municipal governments; and neither its expressed intent nor its spirit can be read into Const. art. 4, § 36, so as to extend the limitation imposed by the latter on the form of municipal government, and thereby make

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CONSTITUTION—Continued.

it coextensive with the limitation imposed by the former upon the form of state government.

—State ex rel. v. City of Mankato, 458.

Laws 1909, p. 181, c. 170, authorizing cities and villages to adopt the commission form of government, *held* constitutional and valid.

—State ex rel. v. City of Mankato, 458.

CLASSIFICATION IN LEGISLATION.

Classification for purposes of legislation is a matter of legislative policy and discretion, and it is only when a classification is manifestly arbitrary that the courts will declare a statute unconstitutional. If there be any fair doubt, it must be resolved in favor of the validity of the classification.

—State v. Bridgeman & Russell Co. 186, 188.

MUNICIPAL CORPORATIONS.

Within the meaning of Const. art. 9, § 1, counties are municipal corporations for the purpose of levying and collecting the assessments provided by the drainage laws.

—Murray v. Smith, 492.

An ordinance of relator city required a street railway company to construct new lines when ordered by the city council. *Held:* The ordinance does not violate Const. (U. S.) art. 1, § 10 or Amend. 14, § 1.

—State ex rel. v. St. Paul City Railway Co. 323.

CONTEMPT.

In proceedings for contempt the commitment, fairly construed, shows that the court imposed a fine, and not a jail sentence. *Held*, that he had authority to impose a fine of $10 and in default of payment to commit the offender to the county jail till the fine was paid, not exceeding ten days.

—State ex rel. v. McDonough, 173.

CONTRACT.

AGAINST PUBLIC POLICY.

A contract of employment between an attorney and his client, whereby the client is prohibited from settling his cause of action unless the attorney consents thereto, is contrary to public policy and void.

—Burho v. Carmichiel, 211.

CONSIDERATION.

It is unquestionably the law that the performance of or an agreement to

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CONTRACT—Continued.

perform an existing legal obligation is not alone a sufficient consideration for a contract.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 226.

CONSTRUCTION.

Contract by letter to furnish cut stone as per plans and specifications for certain building construed, and *held* not to include a provision of such plans and specifications that the contractor must secure the architect's certificate of performance as a condition precedent to the right to demand payment.

—Breen Stone Co. v. W. F. T. Bushnell Co. 283.

Such contract construed, and *held* to be in the nature of an executory contract of sale upon condition precedent, so that acceptance and use of the stone waived all nonconformity thereof to plans and specifications known to the owner prior to such acceptance and use.

—Breen Stone Co. v. W. F. T. Bushnell Co. 283.

CORPORATION.

CONSTITUTIONAL LIABILITY OF STOCKHOLDERS FOR PAYMENT OF DEBTS.

The corporation itself has no authority over the fund created by the stockholder's liability imposed by Const. art. 10, § 3; it cannot compel its payment, nor by any act on its part release the stockholder therefrom. For all practical purposes it amounts to a reserve or trust fund to be resorted to only in proceedings in liquidation, when necessary to meet the payment of obligations of the corporation. It is limited to an amount equal to the par value of the stock held and owned by each stockholder, and exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation. No single creditor can enforce payment of his debt against any one or more of the stockholders, because he has no several or independent right to the fund. Dodge v. Minnesota Plastic Slate Roofing Co. 16 Minn. 327 (368) overruled.

—Northwestern Trust Co. v. Bradbury, 88.

Allen v. Walsh, 25 Minn. 543, and later decisions which follow it, hold that the general statute applicable to winding up the affairs of corporations applies to all classes of corporations and furnishes the exclusive remedy for the enforcement of the stockholder's liability.

—Northwestern Trust Co. v. Bradbury, 89.

TRANSFER OF STOCK CERTIFICATES.

A certificate representing shares of stock is not negotiable paper in the

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CORPORATION—Continued.

sense that the title transferred by a thief to an innocent good-faith holder cannot be questioned.

—Schumacher v. Greene Cananea Copper Co. 128.

The owner of a stock certificate indorsed in blank, who in pledging the same to a reputable going bank is free from negligence, is not estopped from asserting title thereto as against an innocent good-faith purchaser for value, who derives title through one who stole such certificate from the bank while it was pledged, even though the thief be the cashier of the bank.

—Schumacher v. Greene Cananea Copper Co. 124.

A custom prevailing among brokers and bankers to pass stock certificates indorsed in blank from hand to hand without inquiry as to source of title, the same as negotiable paper, does not override the established law that stock certificates have not all the attributes of negotiable instruments; nor does such custom warrant the court in changing the law to conform to the custom.

—Schumacher v. Greene Cananea Copper Co. 124.

ACTION AGAINST CORPORATION.

In an action by a minority stockholder to compel the restoration to the corporation of property acquired by it through investments beyond and in violation of its charter powers, and subsequently unlawfully disposed of without consideration, and for the sale thereof under decree of the court for the benefit of all the stockholders, it is *held* that the complaint states a cause of action for at least a part of the relief demanded, and the demurrer thereto was properly overruled.

—Venner v. Great Northern Railway Co. 447.

The rights of minority stockholders are clearly defined by law. Where the corporation refuses to act, a minority stockholder may maintain an action in behalf of himself and all other stockholders to protect their rights.

—Venner v. Great Northern Railway Co. 457.

Action against a corporation for commission upon sale of certain land. The complaint alleged defendant G, for himself and the corporation, promised to pay plaintiff, that the corporation adopted plaintiff's previous employment as agent to sell, and a contract made a part of the complaint showed that G at the time was president of the corporation. *Held:* A demurrer to the complaint by each defendant was properly overruled.

—Hill v. Glasspoole, 537.

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COSTS.

Eleven actions against the same defendant, for losses caused by the same fire, which were tried as separate cases in the lower court and before one jury which applied the evidence to the case to which it was applicable, and rendered separate verdicts. Appeals in each case, and the same attorneys appeared for all the plaintiffs. One appeal was dismissed. On appeal from the clerk's taxation of costs in each case, *held:* Under rule 29 the allowance of statutory costs is a matter of discretion, and under the circumstances the court allows $25 in the Babcock case, $25 in three other appeals considered as one case, a like amount for the other six considered as one case, and $10 in the appeal dismissed, making $85, to be apportioned pro rata by the clerk to the plaintiffs in the several actions.

—Babcock v. Canadian Northern Railway Co. 446.

Six actions against the same defendant for losses caused by the same fire. One cause was tried separately. The other five cases were thereafter tried under stipulation that they should be tried as one case but separate verdicts returned. There was only one appeal taken, and but one paper book and one brief filed. The same attorneys represented all the plaintiffs and there was but one argument in this court. On appeal from the clerk's taxation of costs it was *held:* That the allowance of statutory costs in this court is a matter of discretion, and on the facts plaintiffs should be allowed as statutory costs no larger sum than $35, to be apportioned pro rata by the clerk to the plaintiffs in the several actions.

—Nilson v. Canadian Northern Railway Co. 528.

COUNTY AND COUNTY OFFICERS.

Act Fixing Boundary between Counties.

To fix and locate a county line which had been left floating and uncertain is not equivalent to changing it from one definite location to another. Laws 1895, p. 622, c. 248, does not change county lines by special act and is not repugnant to Const. art. 4, § 33.

—State ex rel. v. County of St. Louis, 42.

Held, that acquiescence for fifteen years by the state and the counties of St. Louis and Lake in the boundary line between said counties, as located and fixed by that act, precludes inquiry into the correctness of such location, and estops both the state and St. Louis county from claiming that the latter county has any jurisdiction east of the line as fixed by that act.

—State ex rel. v. County of St. Louis, 42.

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COUNTY AND COUNTY OFFICERS—Continued.

CARE OF PRISONERS FROM ANOTHER COUNTY—PRESENTING CLAIMS.

Where prisoners are confined in a county jail other than in the county in which their offense was committed, under the statutes in such cases provided, the county in which the offense was committed is solely liable for the cost and expense incident to such confinement.

—Daniels v. County of Polk, 1.

Where expense is incurred by the sheriff of the county having charge of the prisoners, not specifically fixed and provided for by section 5474, R. L. 1905, a claim therefor must be presented to the other county for allowance, and the sheriff cannot maintain an action against his own county therefor. The court properly sustained a demurrer to the complaint.

—Daniels v. County of Polk, 1.

The legislature intended, by R. L. 1905, § 5474, to impose upon the sending county all expenses necessarily incident to the care, custody, and maintenance of the prisoners so confined, and to relieve entirely the other county from the payment of any part thereof.

—Daniels v. County of Polk, 3.

Probably the proper practice is for the receiving county to pay the amounts expressly prescribed by section 5474 for the care of prisoners, and subsequently present a claim therefor to the sending county, but the amount of claims for expenditures not expressly directed by law to be paid must be presented to and acted upon by the county from which the prisoners are committed, and no liability whatever attaches to the county in which they are confined.

—Daniels v. County of Polk, 3.

DITCH BONDS OF COUNTY.

The bonds issued by the county under the drainage act (section 18, c. 230, p. 322, Laws 1905, as amended [see R. L. Supp. 1909, § 2651–61]) are the direct and general obligations of the county issuing the same.

—Van Pelt v. Bertilrud, 50.

The construction of drainage ditches being the exercise of a governmental function, delegated to the counties of the state for the promotion of public health, welfare and utility, there ought to be no doubt that all of the property within the county may be subject to taxation to provide the funds therefor. The provision of the act, so construed, is within the legislative power.

—Van Pelt v. Bertilrud, 50, 54.

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COURTS (FEDERAL).

Federal courts in equity have jurisdiction to establish the claim of a foreign creditor against the estate of a decedent by a decree to that effect. Such a decree, when a certified copy thereof is filed in the proper probate court, stands as a claim duly proven and allowed against the estate of the decedent. It is the duty of the personal representative of the decedent to pay the claim in the due course of administration, and no order of the probate court allowing the claim or directing its payment is necessary.

—Connecticut Mutual Life Insurance Co. v. Schurmeier, 473.

COURTS (MUNICIPAL).

The municipal court of the city of Minneapolis has no jurisdiction of a counterclaim, though arising out of the transaction made the basis of plaintiff's cause of action, where the amount thereof exceeds the sum of $500, the limit of the court's jurisdiction.

—Duresen v. Blackmarr, 206.

A counterclaim in excess of the jurisdiction of the court may be pleaded as defensive matter, where no affirmative relief is demanded, and the defendant may waive the excess by his pleading and demand judgment for an amount within the jurisdiction of the court.

—Duresen v. Blackmarr, 208.

CRIMINAL LAW.

In a prosecution for the crime of arson in the third degree, the verdict of guilty was sustained by the evidence, there was sufficient corroboration of the testimony of an alleged accomplice, and there were no prejudicial errors in the rulings on the trial.

—State v. Roth, 404.

CONFESSION.

An accused is not compelled to testify against himself when he makes a voluntary confession, and a confession is voluntary when it is not induced by a threat of harm or a promise of favor or reward held out by a person in authority.

—State v. Potoniec, 82.

INSPECTION OF TESTIMONY.

A defendant in a criminal action is not entitled to inspection of testimony furnished the county attorney by the state fire marshal, under the provisions of Laws 1911, p. 257, c. 203, for the purpose of making a motion to quash the indictment.

—State ex rel. v. Steele, 384.

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CRIMINAL LAW—Continued.

R. L. 1905, § 4729, under which either party which has a document which the adversary shows need of inspecting may be compelled to permit inspection, does not apply to criminal cases.

—State ex rel. v. Steele, 385.

PRESENTMENT.

Sections 5289 and 5290, R. L. 1905, refer merely to a case of presentment and do not apply where an indictment has been found, as appears from the subsequent sections 5292 and 5294.

—State ex rel. v. Steele, 386.

CUSTOM.

A custom which runs counter to the settled and established law is not to be adopted by the courts.

—Schumacher v. Greene Cananea Copper Co. 130.

DAMAGES.

The practice of rendering verdicts against the several defendants in an action in different amounts, where their participation in the wrong sought to be redressed has not been the same in kind or motive, is not unknown in this state. Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236.

—Nelson v. Halvorson, 260.

Action for cut stone, furnished pursuant to contract. Defendant, not having, either by its pleadings or its proof, attempted to sever the damages flowing from nonconformity with plans and specifications, which was known before acceptance and use, from those flowing from subsequently discovered nonconformity, *held* not entitled to any recovery by way of recoupment for the latter.

—Breen Stone Co. v. W. F. T. Bushnell Co. 283.

PUNITIVE DAMAGES.

McCarthy v. Niskern, 22 Minn. 90, followed, to the effect that in an action for a tort, where it may be proper to award punitive damages, evidence of a defendant's financial standing is admissible.

—Nelson v. Halvorson, 255.

When two or more persons are made defendants in an action for tort, and the evidence is such that the jury may be justified in assessing punitive damages against one and not against the others, or if such damages may be assessed against all, still there is such difference in their financial ability or in the malice which actuated them that the jury may properly fix different penalties, it is error to instruct that the

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DAMAGES—Continued.

verdict against all must be in the same amount. The erroneous instruction *held* not prejudicial to one of the defendants in the case.

—Nelson v. Halvorson, 255.

Where punitive damages are involved, the court should admit all evidence which bears on the absence of actual malice as well as on its presence.

—Nelson v. Halvorson, 260.

In an action for false imprisonment, the jury rendered a verdict of $500 in favor of plaintiff. *Held:* The award was liberal but not excessive, and, the trial court having approved the amount, this court cannot say that it is so large that passion and prejudice influenced the jury.

—Nelson v. Halvorson, 261.

PERSONAL INJURY ACTIONS.

The trial court did not abuse its discretion in refusing to set aside an award of $12,500 for the loss of a leg below the knee, without unusual suffering and with as good a result as possible, where plaintiff was thirty-nine years old, and his career as a railroad brakeman and conductor was ended by the accident.

—Gibson v. Chicago Great Western Railroad Co. 148.

This court has not and cannot set a standard as to the limit of damages to be awarded for the loss of an arm or a leg.

—Gibson v. Chicago Great Western Railroad Co. 148.

A verdict for $12,500 in this case *held* excessive, and reduced to $8,000, consent to which reduction is made a condition for denying a new trial.

—Landro v. Great Northern Railway Co. 306.

DEATH.

Where a person is killed by the negligence of another, it cannot be inferred that he was guilty of contributory negligence, unless the undisputed evidence clearly and fully rebuts the presumption that he exercised due care for his safety.

—La Pray v. Lavoris Chemical Co. 152, 155.

Where the only next of kin was decedent's mother, sixty-seven years old, to whose support he had regularly contributed for the last three years, *held*, that $2,000 damages for his death was not excessive.

—Bodin v. Duluth Street Railway Co. 513.

DEED.

The registry act cannot be used as an instrument of fraud. If the cir-

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DEED—Continued.

cumstances are such as to inform the purchaser that some wrong is sought to be perpetrated, he cannot blindly shut his eyes and then assume the character of a bona fide purchaser. Knowledge of facts that ought to have put the purchaser on inquiry is constructive notice of every fact that such inquiry would presumably have disclosed.

—Quinn v. Johnson, 382, 383.

Where a purchaser in good faith purchases for a valuable consideration from the holder of an unrecorded deed and thereupon places the unrecorded deed and the deed to himself on record, he is clearly within the protection of the recording act. R. L. 1905, § 3357.

—Quinn v. Johnson, 383.

DISMISSAL AND NONSUIT.

Action for conversion. The answer alleged that upon plaintiff's default in payment under a contract of sale, defendant took the property into its possession, and prayed that defendant be adjudged to have the possession of the property. *Held:* The trial court did not err in granting a motion to vacate the judgment entered and for an order dismissing the action. The answer did not present a counterclaim.

—Gordon v. New England Furniture & Carpet Co. 525.

DITCH.

DRAINING MEANDERED LAKES.

In proceedings to drain certain meandered lakes, under section 1, c. 230, p. 303, Laws 1905 [R. L. Supp. 1909, § 2651—44], it is *held* that the findings of the trial court to the effect that the lakes are not normally grassy and of a marshy character, or no longer of sufficient depth to be of any beneficial public use, are supported by the evidence.

—Madsen v. Larson, 369.

On an appeal from an order of the board of county commissioners ordering the construction of a public ditch for the purpose of draining a meandered lake, no particular force or effect is to be given to findings of the county board as respects the character of the lake. The appeal brings the question to the district court for trial de novo, and should be there determined as though originally at issue in that court.

—Madsen v. Larson, 369.

Laws 1905, p. 303, c. 230, limits the power to drain meandered lakes to those lakes that are grassy and marshy in character, or no longer suitable for any beneficial public use. The proviso in section 1 of the act

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DITCH—Continued.

expressly prohibits the drainage of lakes, unless affirmatively shown to be of the character there stated.

—Madsen v. Larson, 369.

DIVORCE.

In divorce actions, where the summons is served personally out of the state, it is not a prerequisite that there be either the return of the sheriff that defendant cannot be found or the affidavit of plaintiff or his attorney that he believes the defendant is a nonresident, as required under R. L. 1905, § 4111.

—Bundermann v. Bundermann, 366.

ALLOWANCE FOR SUIT MONEY AND ATTORNEY'S FEE.

An allowance to the wife, in a divorce action, for suit money and attorney's fees, must be made to her; but the court, in its discretion, may direct that it be paid to her attorney for her. Any allowance for her support should be paid directly to her, unless, in exceptional cases, the court deems it advisable, for her convenience or protection, to direct its payment to a third party for her.

—Blakely v. Blakely, 482.

The allowance of large sums for attorney's fees and suit money, upon the commencement of a divorce action, before the court can be advised as to its merits, has a demoralizing tendency; hence such allowances should be conservative, until the court is fully advised in the premises. *Held:* An allowance of $150 for suit money and a further sum of $300 for attorney's fees was excessive, and the former was reduced to $50 and the latter to $150.

—Blakely v. Blakely, 483.

VACATING JUDGMENT.

Where defendant could not read English, had recently obtained a decision in her favor in an action for divorce, and the summons and complaint in a second action were served upon her, to which she paid no attention, *held*, that the trial court erred in refusing to grant defendant's application to open a default and for leave to answer.

—Bundermann v. Bundermann, 366.

There is no action in which the courts should grant the relief of opening a default judgment more readily than in an action for divorce, when judgment has not been entered. The state is an interested party, and the action involves much more than mere rights of property. The policy

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DIVORCE—Continued.

of our law is for a bona fide and public trial, and against default judgments.

—Bundermann v. Bundermann, 368.

ELECTION.

While the legal right to vote should not be hampered by a strict or technical construction of the laws, it is equally essential that the mandate of the majority should not be frustrated by a loose and unwarranted administration of such laws, and public policy demands that the election statutes should not be emasculated by construction.

—Nelson v. McBride, 390.

MARKING BALLOT.

Under the election laws of this state, the intent of the voter is the prime consideration in determining for whom his vote is cast; but such intent must be clearly ascertainable from the ballot itself, without indulging in speculation or strained efforts to discover such intent in any other manner than as prescribed by the statutory rules.

—Nelson v. McBride, 387.

Where the ballot on an election for the mayor of a city contained the names of two candidates printed on lines one above the other, and also a third line, in the same order, on which was printed the words "For Mayor," but which contained no name, a crossmark in the square at the end of such third line was insufficient to indicate an intention to vote for either one of the candidates named.

—Nelson v. McBride, 387.

To hold that such ballot must be counted for the candidate named second would in effect always give the candidate last named on the ballot an advantage, if there were two or more candidates named for the same office, whether the ballot were marked through ignorance, inadvertence or an intention to vote for none of the candidates whose names were printed on the ballot.

—Nelson v. McBride, 391.

EMINENT DOMAIN.

PUBLIC USE.

A "public use" is stated to be any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities.

—Mueller v. Supervisors of Town of Courtland, 295.

The fact that a proposed public cartway is solely for the purpose of

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EMINENT DOMAIN—Continued.

furnishing ingress to and egress from the premises of a single landowner, and is to be located entirely over and upon the premises of another, is not so conclusive of the private and against the public character of such way as necessarily to render the taking of the property necessary for such way a taking of private property for private use.
—Mueller v. Supervisors of Town of Courtland, 290.

CONSTRUCTION OF RAILWAY ACROSS CITY STREET.

Conceding that under R. L. 1905, § 2016, a railroad company may and must acquire the right to cross a street in a city or village by condemnation proceedings, equity will not enjoin such crossing before such proceedings are begun; it appearing conclusively that the necessity exists, and that such city or village has at all times an absolute right to compel the railroad company to make the crossing safe for public use.
—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14.

A city or village has no proprietary rights in its streets. Whatever rights it has are held merely in trust for the public use. It is not entitled to compensation when a railway company crosses its streets, and the constitutional provision that private property shall not be taken for public use without just compensation first paid or secured does not apply.
—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14.

DAMAGE FROM FIXING GRADE OF STREET.

Complaint construed to state a cause of action for consequential damages resulting to abutting property from the first establishing of a street grade, and does not necessarily involve defect in plan or negligence in execution thereof, nor is the cause of action based on a defect in a public work, or upon the negligence of any officer or agent of the city, so that service of notice of claim upon the city is a prerequisite to maintenance of an action.
—Hirsch v. City of St. Paul, 476.

The city charter of the city of St. Paul does not provide for assessment of damages resulting to abutting lots from the establishment of a street grade in the proceeding for assessing the cost of grading the street against benefited property; hence such proceeding *held* not a bar to an action to recover damages by the owner of abutting lots resulting from the grade established.
—Hirsch v. City of St. Paul, 476.

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EMINENT DOMAIN—Continued.

It not appearing from the answer that the grade was established before plaintiff petitioned the defendant to grade the street, he cannot be held to have waived damages to his property resulting from the grade established, and it is unnecessary to determine whether, by petitioning after the grade is established, the property owner waives damages.

—Hirsch v. City of St. Paul, 476.

A proceeding by which support of the slopes of a street as constructed was obtained from plaintiff's lot by condemnation was not one wherein he could have had determined the consequential damages arising from the establishment of the street grade.

—Hirsch v. City of St. Paul, 480.

EVIDENCE.

JUDICIAL NOTICE.

We must take judicial notice of the conduct of affairs in an organized county. We may also take notice of the fact that since Laws 1895, c. 248, was enacted, there has been a marked and rapid development in parts of St. Louis and Lake counties.

—State ex rel. v. County of St. Louis, 47.

Judicial notice does not depend on the actual knowledge of the judges, and they may refresh their recollection by resorting to any means they may deem safe and proper.

—State v. Bridgeman & Russell Co. 189.

PRESUMPTION.

Possession of real estate is prima facie evidence of ownership.

—Carlton County Farmers Mutual Fire Insurance Co. v. Foley Brothers, 64.

RES GESTÆ.

Action for personal injury. After the accident plaintiff was taken to the engine house of the mine for temporary treatment. One of his assistants asked the engineer why he lowered the skip. In response, the engineer said he had been signaled to do so. This occurred within twenty minutes after the accident. *Held:* The evidence was admissible.

—Aho v. Adriatic Mining Co. 509.

DEMONSTRATIVE EVIDENCE.

It is within the discretion of the trial court to permit a plaintiff in a personal injury action to exhibit his injuries to the jury, in order to show their extent or to enable a surgeon to demonstrate their nature and character.

—Landro v. Great Northern Railway Co. 308.

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EVIDENCE—Continued.

It is also discretionary to permit tests and experiments in the presence of the jury in a proper case and under proper safeguards. But where there are no wounds, no injuries that can be seen by the jury, it is improper to permit the exhibition of plaintiff's person for the purpose of conducting experiments to prove that he will cry out with pain, or that his muscles will grow rigid when his legs are manipulated in a certain manner.

—Landro v. Great Northern Railway Co. 308.

The exhibition of plaintiff's person to the jury, and the experiments conducted therewith, as well as the cross-examination of defendant's expert witnesses in the manner referred to, criticized, but *held*, under the circumstances of this case, not to be prejudicial error.

—Landro v. Great Northern Railway Co. 306.

DOCUMENTARY EVIDENCE.

Medical books, however celebrated their authors, are not admissible in evidence, because the author is not under oath and not subject to cross-examination.

—Landro v. Great Northern Railway Co. 309.

PAROL EVIDENCE—WRITINGS.

In an action for damages for an alleged wrongful obstruction of a river by defendant's embankment, an alleged contemporaneous verbal agreement on the part of the railroad company, at the time of the execution and delivery of a certain conveyance, to reconstruct its roadbed so as to restore to its natural condition a stream of water thereby obstructed was *held* inadmissible, as varying the terms of the written contract.

—Evans v. Northern Pacific Railway Co. 4.

The test of the completeness of a written contract is the writing itself, and parol evidence to show that it is incomplete is not competent.

—Grant v. King, 54.

If it appears upon the face of a written instrument that the parties did not intend it to be a complete statement of their whole contract, parol evidence is competent to prove a separate agreement as to any matter on which the writing is silent, which is not inconsistent with its terms.

—Grant v. King, 57.

The terms and conditions of a written contract implied by law are no more subject to variation by parol evidence than its express terms.

—Grant v. King, 54.

A writing, referred to in the opinion, relating to the pledge of two diamond rings to secure plaintiff's note to defendant, construed, and *held*

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EVIDENCE—Continued.

to be a complete contract on its face, and that parol evidence was not competent to show that the rings were also pledged to secure the debt of a third party.

—Grant v. King, 54.

OPINION EVIDENCE.

Estimates of distance and speed are always more or less unreliable; but plaintiff was as much entitled to his guess as was the engineer or the trainmaster, who testified for defendant. He was in as good a position to make an estimate as any of the witnesses, and it was for the jury to decide whose testimony should be believed. In short, the whole question was peculiarly one of fact.

—Gibson v. Chicago Great Western Railroad Co. 147.

One can judge of the speed of an approaching object in daylight with some degree of exactness; but it is very difficult, if not impossible, so to do in the dark, when the only thing visible of the moving object is a headlight.

—Bodin v. Duluth Street Railway Co. 516.

For the purpose of testing the qualifications as well as the credibility of an expert, it is generally held that when a witness has testified that the authorities support his view, he may be asked on cross-examination whether a medical work, admitted by him to be a standard authority, does not express a contrary view. And it is no objection to such cross-examination that incidentally the opinions of the author are thus brought before the jury.

—Landro v. Great Northern Railway Co. 309.

EXECUTOR AND ADMINISTRATOR.

SALE UNDER ORDER OF COURT.

A will directed payment of the testator's debts, a legacy of $5,000 to his wife, to be paid before any other bequest, a devise of a leasehold interest to his wife for her life, and the remainder to his brother or the brother's children, the erection of suitable monuments over the graves of his father and mother, a devise to his wife of his homestead, together with the land contiguous thereto which he "shall own at the time of his death," a bequest of his household furniture, etc., to his wife, and directed payment of the bequests in the order set forth. It became necessary to sell certain or all of the real estate to pay the expenses of administration, the debts and legacies provided for in the will.

Held: In directing a sale the court did not err in omitting to order a

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EXECUTOR AND ADMINISTRATOR—Continued.

sale of the homestead, or in ordering the remainder interest to be sold before the life estate.

—Baldwin v. Zien, 178.

Testator's widow assented to the provisions made in his will and elected to take thereunder in lieu of dower. It became necessary to sell certain or all of the real estate. *Held:* The court did not err in directing a sale of the land contiguous to the homestead which was devised to her. Such legacy falls within the general rule that a legacy given in lieu of dower does not abate, but has priority over general legacies, which are mere bounties. The presumption is that, unless the contrary appears from the will, a legacy is intended as a bounty, and not as a purchase or in lieu of statutory provisions in the nature of dower.

—Baldwin v. Zien, 185.

ACTION FOR FAILURE TO PAY CLAIMS.

In an action upon a bond against the executors of an estate and their surety, for their failure to pay a claim against their testator which had been allowed in a suit in equity in the Federal circuit court against the executors and ordered paid, *held:* The complaint alleged facts sufficient to constitute a cause of action. It is not defective because it fails to allege a formal adjudication of plaintiff's claim and an order of the probate court directing payment of the claim.

—Connecticut Mutual Life Insurance Co. v. Schurmeier, 473, 476.

FALSE IMPRISONMENT.

JUSTIFICATION.

In an action for false imprisonment against a constable, a defense may be made out if the officer proves that he had probable ground for believing the person arrested guilty of a felony, although when he made the arrest he mistakenly believed he had a warrant therefor.

—Nelson v. Halvorson, 255.

Held, that the offer by such defendant to prove justification was incomplete, and that he could not have been prejudiced by the refusal of an offer to show certain facts in mitigation of damages.

—Nelson v. Halvorson, 255.

A private person, when sued for false imprisonment, may plead and prove in justification that the party arrested had committed a felony. R. L. 1905, § 5232.

—Nelson v. Halvorson, 258.

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FOOD.

Chaper 468, p. 564, Laws 1909 (R. L. Supp. 1909, § 5169—1), an act to prevent unlawful discrimination in the sale of milk, cream, and butter fat, does not violate the equality provision of either the state or Federal Constitution, or the prohibitions of the state Constitution as to special legislation. The classification of the act is not an arbitrary one, and the act is constitutional.

—State v. Bridgeman & Russell Co. 186.

FRAUD.

In an action for damages resulting from false and fraudulent representations concerning the title to real property, it is *held* that the evidence supports the verdict, and that no reversible errors were committed upon the trial.

—Miller v. Bricker, 394.

FRAUDULENT CONVEYANCE.

INTENT — INSOLVENCY.

Under the laws of this state, a creditor may avoid a transfer made with intent to hinder, delay, or defraud creditors. Such intent of the debtor is essential to the fraudulent character of the transfer. A voluntary conveyance is presumptively fraudulent as to existing creditors, but not conclusively so. Where the debtor is solvent, and retains sufficient property to amply satisfy the claims of existing creditors, in the absence of an actual intent to hinder, delay, or defraud creditors, such a transfer is valid.

—Underleak v. Scott, 136.

The definition of what constitutes "insolvency," contained in section 1, subd. 15, of the bankruptcy act of 1898 [30 St. 544, c. 541], does not control in determining whether a debtor was insolvent, so as to make a voluntary conveyance fraudulent under the laws of this state. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims.

—Underleak v. Scott, 136.

The findings of the trial court that the debtor had no intent to hinder, delay, or defraud his creditors, that he was solvent, and retained property exempt from execution of a reasonable value in excess of his debts, sustained the conclusion of law that the transfer was not void.

—Underleak v. Scott, 136.

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FRAUDULENT CONVEYANCE—Continued.

ACTION TO SET ASIDE CONVEYANCE.

If an execution upon a judgment be returned unsatisfied in the county in which the judgment was obtained, it is unnecessary that another execution should issue in another county where the judgment is docketed, before bringing an action in the second county to set aside a conveyance by the judgment debtor.

—Krause v. Hoeffken, 523.

GUARANTY.

The language of a bond construed, and *held:*

1. That it did not by its terms expire on a day stated.
2. That under its conditions, the surety was liable for the full amount of the bond.

—Longbotham v. Ritchie, 264.

HABEAS CORPUS.

Held, that in a habeas corpus proceeding, where a duly elected and qualified judge of a municipal court is engaged in the hearing of a preliminary examination of a prisoner duly brought before him, he has jurisdiction to punish for contempt of court committed in open court, although there have been proceedings taken under section 131, R. L. 1905, to oust him of jurisdiction to hear that particular case.

—State ex rel. v. McDonough, 173.

Irregularities in the procedure examined, and *held* not available to the relator under the proceedings in habeas corpus.

—State ex rel. v. McDonough, 173, 175, 177.

HIGHWAY.

Evidence that petitioner for a public cartway, by making a road upon his own premises three-quarters of a mile long and by making a detour of one mile and one-half, could reach the public road, or could do so by building a road down the bluff of the Minnesota river, is not so indisputably conclusive against the verdict of the jury, ordering a cartway to be laid out, as to justify this court in disturbing such verdict. Minneapolis & St. L. R. Co. v. Village of Hartland, 85 Minn. 76, 88 N. W. 423, followed.

—Mueller v. Supervisors of Town of Courtland, 290, 296, 297.

APPEAL FROM TOWN BOARD.

The requirement of R. L. 1905, § 1188, that where an appeal is taken from the decision of a town board in the matter of laying out a road, etc., a

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HIGHWAY—Continued.

copy of the notice of the appeal shall be filed with the town clerk of each town through which the road involved runs, is jurisdictional; but, since no provision is made as to how such filing must be proved, the appellant, when jurisdiction of an appeal is challenged for lack of such filing, may show the same by extraneous evidence.

—Mueller v. Supervisors of Town of Courtland, 290.

The order of receiving the proofs in such cases rests in the sound discretion of the court, and there was no abuse of such discretion in receiving such proofs on the trial to the jury.

—Mueller v. Supervisors of Town of Courtland, 290.

Evidence to the effect that a copy of the notice was delivered to the town clerk at his home in the town whereof he was clerk, and that he placed it with the other papers in the case, where it remained until the said papers were delivered to his successor, *held* sufficient to sustain the district court's finding that such copy was in fact filed, though it was not indorsed by the town clerk as having been filed.

—Mueller v. Supervisors of Town of Courtland, 290.

Upon an appeal to the district court from the refusal of a town board to lay out a public cartway, the determination of the damages incident to the establishment of such way is not involved; and where the determination of the town board is reversed, it will be for such board, under the verdict and the judgment entered thereon, to assess the damages and open the way.

—Mueller v. Supervisors of Town of Courtland, 290.

STATE RURAL HIGHWAYS.

Chapter 254, p. 352, Laws 1911, providing for the establishment and maintenance of highways outside of cities and villages, and for the assessment of one-fourth the cost thereof on land specially benefited, is valid, under section 1, art. 9, of the state Constitution, which requires taxes to be uniform upon the same class of subjects, but permits the legislature to authorize municipal corporations to lay and collect assessments for local improvements upon property benefited thereby, without regard to cash valuation.

—Murray v. Smith, 490.

Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L.R.A. 757, may well be regarded as an authority for the proposition that rural highways are not local improvements. This is perfectly true in the sense that lands bordering on the highway are not benefited in the way lots bordering on a city street are benefited. It is not the fact that the road is in front of along the border of the farm which creates the

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HIGHWAY—Continued.

special benefit, but the fact that the farmer is given a good road to use in going to and from his markets.

—Murray v. Smith, 492, 493.

If there are local benefits that can be set off against the damages awarded to a landowner by the establishment of a highway, the same local benefits are sufficient to warrant an assessment. See Swenson v. Board of Supvrs. of Town of Hallock, 95 Minn. 163, 103 N. W. 895.

—Murray v. Smith, 494.

HOMICIDE.

Defendant was convicted of murder in the second degree. It is *held:*

1. The verdict was justified by the evidence.

2. The court did not err in the admission of defendant's statements to the officers or his letter to his mother, or in its instructions to the jury.

—State v. Potoniec, 80.

In a trial for murder, testimony of medical witnesses to the effect that in their opinion death was caused by strangulation was properly received, and it was not an invasion of the province of the jury.

—State v. Potoniec, 82.

As defendant was acquitted of murder in the first degree, he was not prejudiced by any inaccuracy in instructions as to premeditation.

—State v. Potoniec, 82.

HUSBAND AND WIFE.

Plaintiff, by virtue of some arrangement with the husband of the mortgagor, sought to recover rent of premises upon which he held a mortgage. *Held:* The husband had no authority to enter into the contract and it was invalid. R. L. 1905, § 3609.

—Sutton v. Brekke, 519.

INDICTMENT AND INFORMATION.

Defendant was convicted of arson in the third degree. It is *held* it was not error to refuse to permit defendant to demur to the indictment after the trial had begun; it appearing that the only ground for demurring was that the indictment failed to state facts sufficient to constitute the crime.

—State v. Roth, 404.

An indictment for arson in the third degree is not bad because it fails

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INDICTMENT AND INFORMATION—Continued.

to state that the burning was "under circumstances not amounting to arson in the first or second degree," nor because the acts charged might also constitute a crime under R. L. 1905, § 5126.

—State v. Roth, 404.

INSURANCE (FIRE).

An assignment of a claim for damages to personal property by fire to the plaintiffs, who, as insurers of said property, paid the loss to the owners, *held* not based upon the policy pursuant to which such payment was made, and hence not affected by any illegality which may have existed in the policy.

—Babcock v. Canadian Northern Railway Co. 434.

INTOXICATING LIQUOR.

SALE AT WHOLESALE.

Section 135, c. 8, p. 55, Laws 1895, giving to city councils the power to license and regulate the sale of intoxicating liquors, construed, with reference to the whole legislation of the state dealing with the subject of licensing the sale of intoxicating liquors and the uniform practical construction thereof, and *held*, that it does not apply to exclusively wholesale dealers selling in quantities of five gallons or more.

—State ex rel. v. Sullivan, 329.

SEARCH WARRANT.

Upon a complaint charging plaintiff with keeping an unlicensed drinking place upon his hotel premises, with keeping and maintaining a wholesale house for the sale, etc. of intoxicating liquors enumerated, on a railroad right of way opposite the hotel, and that he was not licensed to keep and sell intoxicating liquor, a warrant was issued reciting the substance of the complaint and commanding the sheriff or any constable, etc. to arrest plaintiff and bring him before the justice, and to enter the saloon and warehouse described in the warrant and to search the premises and seize and hold all intoxicating liquor found thereon. *Held:* The warrant was a full protection to the officer and his deputies who obeyed its commands.

—Ingraham v. Booton, 105.

Section 1553, R. L. 1905, does not require that a warrant for the search and seizure of intoxicating liquor in an unlicensed drinking place shall state that the place is an unlicensed drinking place. The warrant should describe the premises to be searched and the property to be seized; but we know of no rule making such a warrant void

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INTOXICATING LIQUOR—Continued.
on its face, if it does not contain a statement of the offense charged in legal and accurate language.
—Ingraham v. Booton, 109.

JUDGMENT.
Action for the purchase price of lots, which the plaintiff sold and agreed to convey to the defendant, who agreed to pay the price on tender of deed. Defense, that the defendant was induced to enter into the contract by the misrepresentation of the plaintiff as to the location of the lots. *Held*, that the findings of fact in favor of the plaintiff are sustained by the evidence, and that they justify judgment for plaintiff, and, further, that the trial court did not err in its rulings as to the admission of evidence.
—Anderson v. White, 402.

VACATING DEFAULT.
Courts ought to be ever ready to give a claim asserted in good faith a hearing on the merits, and to that end the excusable neglect of an attorney should not be given too strict or narrow a meaning, thereby depriving the client of his day in court.
—Southern Minnesota Investment & Loan Co. v. Livingston, 423.
Where a default has been declared, and the court is asked to remove it, the prevailing practice is to require a party to show merit in the claim asserted or defense interposed.
—Southern Minnesota Investment & Loan Co. v. Livingston, 423.

VACATING ORDER FOR DISMISSAL.
Motion to vacate an order for dismissal of an action, pursuant to a stipulation between plaintiff and defendant's attorneys, and a judgment entered thereon. *Held:* The order was a discretionary one and there was no abuse of discretion in vacating the judgment of dismissal. Letters of plaintiff's attorney to the judge and defendant's attorney announcing his abandonment of a former motion to set aside the stipulation were not a waiver of his right to apply to the court to be relieved from the judgment thereafter entered upon the stipulation.
—Jorgensburg v. Minneapolis, St. Paul & Sault Ste Marie Railway Co. 540.

VACATING ORDER FOR JUDGMENT.
An order vacating an order for judgment and reinstating the cause for trial upon the issues made by the pleadings was within the discretion of the court, and no abuse of discretion appeared.
—S. F. Bowser & Co. v. Kotsmith, 536.

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JUDGMENT—Continued.

VACATING SATISFACTION OF JUDGMENT.

The trial court, under the facts in this case, had power to set aside on motion a false or fraudulent satisfaction of a judgment rendered by it.

—Finnish People's Home Co. v. Longyear-Mesaba Land & Iron Co. 313.

Where a question had been tried and judgment entered, and thereafter on the hearing of a motion to set aside a pretended satisfaction of the judgment, the appellant endeavored to retry the very question decided, there were no errors in excluding evidence offered by plaintiff on the hearing.

—Finnish People's Home Co. v. Longyear-Mesaba Land & Iron Co. 315.

LANDLORD AND TENANT.

The appellant was the owner of a building in which there was a freight elevator maintained by it for the use of its tenants and their employees. The plaintiff's intestate, an employee, was killed by the alleged negligence of appellant in failing to keep the elevator in a safe condition. *Held:*

1. It was not necessary to show that the landlord had actual notice of the unsafe condition of the elevator in order to charge him with negligence, for it was sufficient to show that he either knew, or by the exercise of ordinary care he might have known, its condition. Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289.
2. The evidence was sufficient to sustain a finding by the jury that the appellant was negligent in the care of the elevator, which was the proximate cause of the death of the deceased, who was not guilty of contributory negligence. The verdict is sustained by the evidence.

—La Pray v. Lavoris Chemical Co. 152.

RENEWAL OF LEASE.

Where a lessee of property sublets a portion of the leased premises, and covenants for a renewal thereof on condition that his own lease be renewed, it is not material, in so far as concerns the right of the sublessee to a renewal, whether the original lease be renewed by formal written contract or be effected by operation of law. If the lessee's term be extended in either manner, the sublessee may demand a renewal of his lease as a matter of strict right.

—Hotel Allen Co. v. Estate of John G. Allen, 333.

A new lease to the tenant, executed a short time after the expiration of the original lease, which contained a stipulation for a renewal,

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LANDLORD AND TENANT—Continued.

held, on the facts stated in the opinion, in legal effect a renewal, vesting in the sublessee the right to a renewal under the terms of his contract.

—Hotel Allen Co. v. Estate of John G. Allen, 333.

The subtenant continued in possession of the premises under the asserted right of renewal, and paid the rent as stipulated by his contract, which plaintiff accepted and received without objection. *Held* a waiver of compliance with conditions imposed by the contract precedent to the right to demand a renewal.

—Hotel Allen Co. v. Estate of John G. Allen, 333.

It is settled in cases of this kind that a renewal of a lease becomes effectual when the lessee claims the right and is permitted to hold over, in which case a formal written renewal is unnecessary.

—Hotel Allen Co. v. Estate of John G. Allen, 337.

It is also well settled that the terms and conditions upon which the lessee may demand a renewal may be waived by the parties, and when without compliance therewith a new lease is in fact entered into by the parties, or the tenant holds over under claim of a right of renewal, a waiver of precedent conditions follows as a matter of law.

—Hotel Allen Co. v. Estate of John G. Allen, 337.

LOGS AND LOGGING.

Where a lumber company agreed and undertook to drive certain logs to its hoist, and there scale them and pay for them at a certain price per thousand feet, an unauthorized disposition of such logs to third persons without so scaling them and paying therefor, as provided in the agreement under which it received them, constituted a conversion.

—Sheldon-Mather Timber Co. v. Itasca Lumber Co. 355.

Where logs not marked with a recorded mark were delivered to a lumber company under an agreement whereby such company undertook to drive them to its hoist, where they were to be scaled and paid for, as between the owner of the logs and the company so undertaking to drive them, the logs were not, during the drive, "abandoned," within R. L. 1905, § 2580; and the owner of such logs was not precluded from claiming a conversion thereof by such company at its hoist.

—Sheldon-Mather Timber Co. v. Itasca Lumber Co. 355.

Where, during the drive, some of the logs were left along the river and failed to reach the hoist, the company, which agreed and undertook to drive them, was, when sued by the owner for a subsequent conver-

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LOGS AND LOGGING—Continued.

sion by disposition thereof to a third party, precluded from setting up "abandonment," under R. L. 1905, § 2580.

—Sheldon-Mather Timber Co. v. Itasca Lumber Co. 355.

Evidence in action for conversion of logs *held* sufficient to sustain the trial court's findings of fact, and the findings of fact sufficient to sustain the conclusion of law that defendant converted plaintiff's logs.

—Sheldon-Mather Timber Co. v. Itasca Lumber Co. 355.

MALICIOUS PROSECUTION.

In an action for the malicious prosecution of a civil action, it is *held* that:

1. The burden of proof is on the plaintiff and the fact of want of probable cause must be established by him by a fair preponderance of the evidence.

2. The questions of want of probable cause, malice, and whether the civil action was commenced in good faith, acting upon the advice of counsel, after a full and fair statement of the facts, were properly submitted to the jury.

3. The evidence sustains the verdict.

—Nelson v. International Harvester Co. 298.

Advice of counsel is a complete defense to an action for the malicious prosecution of either a civil or a criminal charge, when it is made to appear that the prosecutor fully and fairly stated all the facts within his knowledge, or which by reasonable diligence he might have learned, to a reputable attorney, and that in bringing the action or instituting the criminal prosecution he honestly and in good faith relied and acted upon the advice given him. Nor is it material whether the advice be sound or unsound in point of law.

—Nelson v. International Harvester Co. 304.

Want of probable cause having been shown, the presumption of malice arose, and it was not necessary that actual malice be shown.

—Nelson v. International Harvester Co. 304.

Where the evidence is undisputed, and it clearly appears that all the facts were fully submitted to the attorney, as well as the good-faith reliance upon his advice, the question resolved itself into one of law for the court.

—Nelson v. International Harvester Co. 305.

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MASTER AND SERVANT.

LIABILITY OF MASTER TO SERVANT.

Action for personal injury to servant. *Held:* The questions of defendant's negligence, decedent's contributory negligence and assumption of risk were, on the evidence, questions of fact for the jury.
—Hartikka v. D. G. Cutler Co., 344.

The rule that, where the master orders his servant into a place of danger to do some specified work, he owes the servant the affirmative duty to exercise reasonable care to protect him from injury while so engaged followed and applied in case where plaintiff was ordered to clean out the skip hole at the bottom of a shaft, and the skip was lowered by the engineer while plaintiff was at work underneath.
—Aho v. Adriatic Mining Co. 504.

The evidence was sufficient to support the verdict, and the jury were justified in answering the special question submitted to them to the effect that plaintiff's injuries were caused by the negligence of defendant company. It was not necessary that plaintiff point out the person who gave the signal to the engineer. The fact that the skip was lowered upon plaintiff while occupying the dangerous position was evidence that defendant failed in its duty to protect him.
—Aho v. Adriatic Mining Co. 507, 508.

Action for personal injury to servant caused by a defective ax handle in the hands of a fellow servant. *Held:* The master's duty is to use ordinary care in providing his servants with reasonably safe instrumentalities to work with. If the master knowingly furnishes defective tools to a servant, and while being carefully used the tools break because of such known defect, and cause an injury to another servant ignorant of the fact that defective tools were furnished, an action lies in favor of the injured servant.
—Pearson v. Norling, 527.

LIABILITY OF RAILROAD COMPANY TO SERVANT.

Plaintiff's intestate, in charge of a large crew reconstructing defendant's switchyard, in constant use for traffic, was struck and killed by a switch engine. *Held*, that the question of decedent's contributory negligence in failing to notice the approach of the engine, by reason of being absorbed in the discharge of his duties, was for the jury.
—Torkelson v. Minneapolis & St. Louis Railroad Co. 73.

Plaintiff, while working on defendant's track, at a point one hundred feet from a signal board which required trains to stop at that point, was struck by a passenger train which came down the grade at a high rate of speed, with steam shut off, without stopping at the signal board or giving warning of its approach. The engineer and

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MASTER AND SERVANT—Continued.

fireman saw plaintiff when he was perhaps five hundred feet distant, but did not attempt to lessen speed. In an action for the injury it was *held:*

1. The evidence was sufficient to take the case out of the general rule that ordinarily trainmen are not required to give warning of the approach of the train to workmen on the track.
2. The question of defendant's negligence was one of fact for the jury.

—Brown v. Chicago, Burlington & Quincy Railroad Co. 149.

Action for personal injury. Plaintiff fireman claimed injury from a string of coal cars striking the engine. *Held:* As it did not conclusively appear that the servants handling the cars were free from fault, the court erred in directing a verdict in favor of defendant and in denying plaintiff's motion for a new trial.

—Beck v. Great Northern Railway Co. 530.

GUARDING DANGEROUS MACHINERY.

Action for personal injuries. Verdict in favor of plaintiff. *Held* that the evidence supports the verdict. If it be conceded that the issue whether it was practical to guard the saw was improperly submitted to the jury, that fact furnishes no basis for granting defendant's motion for judgment notwithstanding the same, since the other charges of negligence were sufficient to support the verdict.

—Fyle v. Minnesota Bee Supply Co. 92, 94.

CONTRIBUTORY NEGLIGENCE.[1]

Action for personal injury. Whether plaintiff track laborer was negligent in not using his eyes to see an approaching train and relying wholly upon his ears, was, under the special circumstances of this case, a question of fact for the jury.

—Brown v. Chicago, Burlington & Quincy Railroad Co. 149.

Evidence in a personal injury action considered, and *held*, that the trial court rightly directed a verdict for the defendant, on the ground that the evidence conclusively established the contributory negligence of the plaintiff's intestate.

—Steele v. Red River Lumber Co. 199.

LIABILITY OF MASTER TO THIRD PERSONS.

Where the owner or occupant of lands causes or permits fire to be set thereon to accomplish a desired result under such conditions that the act of then setting such fire necessarily endangers the property of others unless proper precautions are taken, a duty arises to take such

[1] See Liability of Railway Company to Servant, supra, page 583.

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MASTER AND SERVANT—Continued.

precaution, which cannot be avoided by delegating the work to an independent contractor.

—Carlton County Farmers Mutual Fire Insurance Co. v. Foley Brothers, 59.

Held, that the agreement between a railway company and others in this case for constructing a railway is not of a character to require, in so far as it relates to the setting and escape of the fire which resulted in the destruction of plaintiff's property, an instruction to the jury that the relation of independent contractor existed between any of the persons doing work upon such construction.

—Carlton County Farmers Mutual Fire Insurance Co. v. Foley Brothers, 59.

MECHANIC'S LIEN.

Action to foreclose a mechanic's lien. The evidence showed the house was practically completed in December, and the owner settled with the contractor, retaining about $60 to pay for screens which were delivered in February. In April the contractor ordered of plaintiff four small boards which were not needed. They were thrown down at the side of the house and left there, but afterwards taken away. The lien statement was filed July 6. *Held:* The trial court was fully justified in finding that the house was completed on January 20, that the delivery of the boards was an independent transaction between the contractor and plaintiff, and the lien was not filed within ninety days after the last item was furnished.

—Hennepin Lumber Co. v. Pedersen, 534.

MORTGAGE.

PURCHASE-MONEY MORTGAGE.

Where a mutual agreement is made, between a vendor in a contract to convey land, the vendee therein, and a third party, that the vendee is to obtain money to pay part of the balance of the purchase price from such third party, securing the same by a first mortgage upon the land, and the vendor is to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and mortgages are executed and delivered, such mortgages are superior to the lien of a judgment obtained against the vendee prior to the delivery of the mortgages.

—Marin v. Knox, 428.

If such deed and mortgages be executed and delivered pursuant to such

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MORTGAGE—Continued.

mutual agreement, it constitutes but one transaction, although the documents may not have been delivered on the same day.

—Marin v. Knox, 428.

The evidence examined, and *held* to sustain the finding that the mortgages of the defendants were purchase-money mortgages, and entitled to priority over the title acquired by plaintiff through execution sale on a judgment obtained against the vendee prior to the delivery of the mortgages.

—Marin v. Knox, 428.

A purchase-money mortgage has priority over a previously docketed judgment against the mortgagor. Banning v. Edes, 6 Minn. 270 (402).

—Marin v. Knox, 430.

It is also the settled law of this state that a person other than the vendor may obtain a purchase money-mortgage, so called, thereby acquiring the same equities as would the vendor, had he taken the mortgage.

—Marin v. Knox, 431.

Because a contract of sale, which contained no provision for receiving a purchase-money mortgage in part payment was made in 1902, it does not follow that in 1908 the parties could not agree to give and accept such a mortgage, which would not be subject to a lien of a judgment recovered against the purchaser in the year 1907.

—Marin v. Knox, 428, 432.

ASSUMPTION OF DEBT BY GRANTEE OF MORTGAGOR.

It is the law of this state that a provision in a deed, whereby the grantee agrees with the grantor to assume and pay an outstanding mortgage on the property conveyed, creates no enforceable obligation, unless the grantor is personally liable to pay the debt; but if the grantor is personally liable, the mortgagee or his assignee may enforce the obligation by action against the assuming grantee.

—Wood v. Johnson, 267.

Whether the grantor in such a deed is personally liable for the mortgage debt is to be determined according to the laws of the state where his contract was made. If such laws make the grantor personally liable, his grantee, who assumes and agrees to pay the mortgage, is liable, though such assumption agreement be made in this state.

—Wood v. Johnson, 267.

In an action by the mortgagee or his assignee in the courts of this state to enforce the assumption agreement made by such grantee, it is not necessary to plead the laws of another state, under which

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MORTGAGE—Continued.

his grantor was liable for the debt. Such laws are merely evidentiary facts, as distinguished from issuable facts. Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, followed and applied.

—Wood v. Johnson, 267.

FORECLOSURE WHEN TITLE TO LAND IS REGISTERED.

In this action to set aside the foreclosure of a mortgage by advertisement, it is *held*:

1. When land is registered under the Torrens law subject to the lien of a mortgage, it is not necessary to the foreclosure of such mortgage by advertisement that assignments of the same made before the decree of registration should be registered, or a memorial thereof be entered upon the certificate of title. Section 55, c. 305, p. 478, Laws 1905, applies only to mortgages and assignments made after the decree.

2. On the facts in this case, the owner of the mortgage had the right to foreclose by advertisement, and there was no defect in the proceedings.

—Sander v. Stenger, 424.

Clearly neither the existence of an assignment of mortgage of record from a person who had no apparent interest in the mortgage, nor the fact that the notice of foreclosure referred to it, in any way affected the right to foreclose the mortgage under the power of sale.

—Sander v. Stenger, 428.

MUNICIPAL CORPORATION.

It is a matter of common knowledge that, when used in connection with municipal government, such terms as mayor, council, etc., are not used in their strictly technical sense as designating officers of exclusively executive and legislative functions respectively.

—State ex rel. v. City of Mankato, 466.

COMMISSION FORM OF GOVERNMENT.

The requirement of Const. art. 4, § 36, that home rule charters must provide for a "mayor or chief magistrate, and a legislative body," does not of itself import such a severance of the several departments of municipal government as to preclude the legislature from authorizing cities and villages to adopt the commission form of government, wherein the mayor is vested with legislative functions and the council is given other than legislative powers.

—State ex rel. v. City of Mankato, 458.

The Mankato city charter, which provides and establishes the com-

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MUNICIPAL CORPORATION—Continued.

mission form of government for the said city, is authorized by Laws 1909, p. 181, c. 170, and does not transcend the constitutional limitations imposed upon the form of municipal government.

—State ex rel. v. City of Manako, 458.

SEARCH WARRANT PROTECTION TO OFFICER.

In an action to recover damages for the seizure of intoxicating liquors which belonged to plaintiff, brought against a village marshal and citizens commanded by him to assist in the search and seizure, it is *held*:

1. That when a search warrant is fair on its face, is issued by a court which has jurisdiction of the subject-matter, contains nothing to apprise the officer directed to execute it that it was issued without authority, and is not a violation of the Constitution or statute of this state, such a warrant is a full protection to the officer and his deputies who obey its commands.
2. Such a warrant protects the officer, though it does not contain a technically accurate or sufficient charge of the offense, and though the complaint on which it was issued does not.
3. The warrant under which defendants in this case searched plaintiff's premises and seized intoxicating liquors found thereon was a full protection to defendants.

—Ingraham v. Booton, 105.

CONTRACTS.

Owing to informalities, a contract attempted to be made between plaintiff and defendant, a city under a home rule charter, was invalid. Thereunder coal was delivered by plaintiff to the city electric light plant for three months, and the coal consumed as delivered. *Held* that, the attempted contract being within the power of the defendant to make, plaintiff, upon the pleading and proof, was entitled to recover upon a quantum valebat for the coal received and consumed by the city.

—Laird Norton Yards v. City of Rochester, 114.

The complaint having declared on both an express and implied contract, no election being required at the trial, and evidence being received as to the reasonable value without valid objection, the court erred in restricting plaintiff's right to recover to the express contract pleaded.

—Laird Norton Yards v. City of Rochester, 114.

Provisions in home rule charters of cities may not be construed so as to abrogate well-established equitable doctrines as applied to quasi municipal business transacted by such cities.

—Laird Norton Yards v. City of Rochester, 114.

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MUNICIPAL CORPORATION—Continued.

Where the council of defendant city authorized a department of the city to enter into a written contract for fuel, in accordance with bids offered, the contract was executed by the proper city officers, and then the plaintiff erased one sentence in the document and signed it, but the contract as amended was never approved by the public utility board or the council, the mere retention of the contract by the public utility board will not amount to a ratification by the city.

—Laird Norton Yards v. City of Rochester, 119.

When a municipality embarks in enterprises outside the purely governmental, it becomes, to a certain extent, amenable to the rules of law that apply to the dealings of individuals and private corporations in like business.

—Laird Norton Yards v. City of Rochester, 119.

Any city may frame a charter, but it must be in harmony with and subject to the constitution and laws of the state. We conceive this to mean, not only the statute law, but the common law found in the decision of the courts as well. It cannot be that under the provisions of home rule charters municipal corporations may abrogate the common-law rule of estoppel, or other settled equitable doctrines, in the conduct of quasi municipal enterprises into which they may embark.

—Laird Norton Yards v. City of Rochester, 121.

Liability of Contractor to Third Persons.

Action against a contractor engaged in laying water mains in streets of a village, for injuries to plaintiff's horse, which strayed at night and fell into an open trench. It was conceded at the trial that defendant was under legal obligation to exercise reasonable care, by the erection of guards and barriers, to prevent stray animals from getting into the trench. There was no guard along the trench save the excavated earth on one side and white lanterns posted at night. *Held:* The trial court properly rejected defendant's offer to show that other careful contractors erected no guards or barriers other than the pile of earth on one side. Within the conceded rule of responsibility this was wholly insufficient and the failure to place other guards along the trench was negligence as a matter of law.

—Empey v. Lovell, 520.

Use of Streets.

A city or village has no proprietary rights in its streets. Whatever rights it has are held merely in trust for the public use.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 19.

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MUNICIPAL CORPORATION—Continued.

Municipal corporations, excluding the town and county, are under legal obligation to exercise reasonable care to keep and maintain all their streets and public places in safe condition for public use, and are liable for a negligent failure of compliance therewith.

—Sundell v. Village of Tintah, 170.

The rule applies to all streets within the borders of the municipality, whether in the settled or platted part thereof or in the outlying districts, with the qualification or limitation that the same diligence and care is not required in respect to streets remote from the settled part of the municipality.

—Sundell v. Village of Tintah, 170.

The city has an absolute right to compel defendant railway company to provide guards, gates, planking, bridges, and, in short, to do everything that goes to make a crossing safe for public use.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 19.

MUNICIPAL DEPARTMENTS—FIRE.

The fire department is one of the public governmental agencies of the city, for whose mistakes or negligence in subduing a fire the city is not liable to the individual injured thereby. This is placed on the ground that the department, in arresting fires, is discharging a public governmental or police duty.

—Erickson v. Great Northern Railway Co. 351.

A fireman is not a servant of the owner of the property he is attempting to save, so as to come within the protection of Laws 1893, p. 99, c. 7, "An act for the protection of employees."

—Erickson v. Great Northern Railway Co. 352.

If a necessity therefor exists, fire hose may be laid on private property and across railway right of way to subdue fires. Stringing hose thereon is a lawful use of a public street.

—Erickson v. Great Northern Railway Co. 353.

MUNICIPAL DEPARTMENTS—WATER, LIGHT AND POWER COMMISSION.

The Water, Light, Power and Building Commission of the city of East Grand Forks being a governmental department of the city, the city attorney is its legal adviser, and it has no express or implied power to employ its own attorney, thereby creating a liability against the city.

—State ex rel. v. Gorman, 323.

Conceding, without deciding, that an emergency may give power where none otherwise exists, it is *held* that, when the commission employed the attorney for whose services the city is sought to be made liable,

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MUNICIPAL CORPORATION—Continued.
no emergency existed, the commission had performed its
under no legal obligation to assist a private person to
audited and ordered paid by it against the city.
—State ex rel. v. Gorman, 323.

NAVIGABLE WATER.
In this action to recover damages caused to a launch
stake claimed to have been left by defendants in
between the open water of a lake and their dock,
defendants were negligent, whether their acts we
of the accident, and whether plaintiff was guil
gence, were questions for the jury, and the ve
evidence.
—Peterson v. Skarp, 102.
There was no error in the court's charge or in
tions requested.
—Peterson v. Skarp, 102.

NEGLIGENCE.
Where a railway track is laid across a
a duty arises on the part of the rail
ordinary care to discover and avoid i
fully on such crossing, so that wher
ment of such city across the crossi
railway running its locomotive ov
to extinguish the fire and causing
necessary for the owner thereof
loss, to plead and prove wanto
cutting the hose, or prove th
had actual knowledge of its
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property.
—Erickson v. Great Nor

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NEGLIGENCE—Continued.

if the circumstantial evidence furnishes a reasonable basis for the inference that the injury was caused by the negligence.

—La Pray v. Lavoris Chemical Co. 152, 155.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence on the part of an injured party, which will defeat a recovery, consists of two essential elements. He must not only have been negligent, but his negligence must have contributed proximately to his injury.

—Steele v. Red River Lumber Co. 201.

The firemen of a fire department in a city are not the servants or agents of the person whose property they attempt to save from fire, so that their negligence in failing to take the proper course in the extinguishment of the fire avails one who by a negligent act cut off the water supply by which the fire was being successfully subdued, and thereby proximately caused the destruction of the property.

—Erickson v. Great Northern Railway Co. 348.

NEWSPAPER.

"Finance and Commerce," a daily paper published in Minneapolis, is a newspaper qualified as a medium of official and legal publications, under R. L. 1905, § 5515.

—Olsen v. Bibb Co. 214.

It is not the particular kind of intelligence published that constitutes one publication a newspaper rather than another. "Finance and Commerce," though mainly devoted to legal and business news, does publish each day items of general news.

—Olsen v. Bibb Co. 216.

NEW TRIAL.

Whether misconduct of certain jurymen in visiting the place of the accident is ground for a new trial must be determined from the particular facts presented in each case. No general rule has ever been laid down by which all cases may be tested, further than that actual prejudice must appear.

—MacKinnon v. City of Minneapolis, 263.

Misconstruction of a pleading by an attorney is no legal excuse for a failure to produce witnesses upon the trial, nor may the testimony of such witnesses be considered newly discovered evidence; the attorney all the time knowing its purport.

—Farrington v. Farrington, 272.

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NEW TRIAL—Continued.

DISCRETION OF COURT.

Action for injuries to a launch caused by collision with a stake which plaintiff claimed had been left by defendants in a navigable passage between their dock and the open water of a lake. On motion for a new trial on the ground of newly discovered evidence, affidavits that plaintiff did not own the launch (which were mere hearsay) were fully met by affidavits in opposition. *Held:* There was no abuse of discretion in denying a new trial.

—Peterson v. Skarp, 105.

An order denying a new trial for alleged misconduct of certain members of the jury in visiting the place of the accident, the subject-matter of the action, *held* not an abuse of discretion. The record affirmatively shows there was no prejudice to either party.

—MacKinnon v. City of Minneapolis, 261.

An order granted a motion for a new trial based on several grounds, without assigning any reason. An appeal was taken from the order, but before return on appeal was made, on motion of respondent the trial court amended its order by stating that the order was made on the ground that the verdict was not justified by the evidence, as well as upon the other grounds set forth. *Held:* The order, as amended, took the case out of the proviso to R. L. 1905, § 4198, subd. 7, and was a discretionary order, in so far as it granted a new trial on the ground that the verdict was not justified by the evidence, and the judge did not abuse his discretion in making the order.

—Dorffi v. Duluth, Winnipeg & Pacific Railroad Co. 277, 278.

NEWLY DISCOVERED EVIDENCE.

Where permission is asked to move for a new trial on the ground of newly discovered evidence since taking an appeal to this court, the whole matter of leave to make such motion, as well as its decision, rests with the trial court.

—Archer v. Whitten, 123, 124.

PARTNERSHIP.

H. & N., a copartnership, entered into an executory contract with M. & Co. for the purchase of certain grain drills. The drills were warranted by M. & Co. to be well made and capable of doing good work. There was a breach of the warranty, in that the drills were defective; but H. & N. failed to comply with the warranty as respects notice to M. & Co. Thereafter, and before settlement under the contract, N. retired from the copartnership, and was succeeded by T. The new firm settled for the drills, giving their promissory note for the amount called for

117 M.—38.

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PARTNERSHIP—Continued.

by the contract as the purchase price. The note was subsequently, but after maturity, transferred to plaintiff in this action. In this action to recover thereon, it is *held* that the question whether the new firm assumed the obligations of the old firm in respect to this contract, and the further question whether the settlement referred to was had under and pursuant to the original contract, or in consideration of a new and independent agreement on the part of M. & Co., to repair and put the drills in working order, and whether the promissory note was given solely in consideration of that agreement, were questions of fact, and that the evidence sustains the verdict.

—American Seeding Machine Co. v. Holzbauer, 278.

PLEADING.

COMPLAINT.

In determining the sufficiency of a complaint, either in an action at law or suit in equity, when challenged by a general demurrer, the rule guiding the court is not to determine whether plaintiff is entitled to all and singular the relief demanded or prayed for, but whether the allegations thereof, properly and liberally construed, entitle him in any measure to the relief demanded. If they do, the demurrer will be overruled.

—Venner v. Great Northern Railway Co. 454.

DEMURRER.

Plaintiff moved the trial court for an order "overruling the demurrer" to the complaint "as frivolous," and for judgment thereon, basing his motion on the pleadings and all the files and proceedings in the action. The court overruled the demurrer and granted defendant leave to answer. *Held:*

1. The court correctly determined that the application was for an order overruling the demurrer, and not merely a motion to strike out the demurrer as frivolous.
2. It was not the duty of the court to consider the files in the action in which the judgment was obtained, but only the files in this action.

—Krause v. Hoeffken, 523.

Action by a judgment creditor to set aside a conveyance made by the debtor with the alleged intent to hinder, delay and defraud plaintiff. If the judgment is void, that is matter of defense to be made by answer, not by demurrer.

—Krause v. Hoeffken, 523.

It is elementary that a demurrer will not lie, except for defects apparent on the face of the pleading to which it is directed.

—Krause v. Hoeffken, 523.

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PLEADING—Continued.

AMENDMENT.

Court *held* not to have abused its discretion in allowing amendment of complaint to conform to proof, by changing the plaintiff's allegation of ownership of the lands damaged by the fire herein involved and on which the personalty destroyed or injured by such fire was situated to an allegation of interest as entryman under the homestead laws.

—Babcock v. Canadian Northern Railway Co. 434.

Court *held* not to have abused its discretion in denying the defendant's application for a continuance on account of such amendment.

—Babcock v. Canadian Northern Railway Co. 434.

PRINCIPAL AND AGENT.

Action upon a promissory note. Defendants claimed the note was given in consideration of an agreement on the part of the payee's agent to put in order certain grain drills sold to defendants. *Held:* It was within the implied power of the agent to make the special agreement, since it was incidental and necessary to the exercise of his actual authority.

—American Seeding Machine Co. v. Holzbauer, 278.

PRINCIPAL AND SURETY.

The evidence examined, and *held* to sustain the finding that plaintiff's contractor, whose performance the defendant by its bond guaranteed, had defaulted.

—Butts v. Pacific Surety Co. 70.

PROCESS.

It is not the law that a sheriff, marshal or other officer whose duty it is to serve process issued by a court is obliged to go behind a warrant fair on its face, and at his peril determine questions of law that courts might differ on concerning the sufficiency of prior proceedings. It is the officer's duty to obey such process without question.

—Ingraham v. Booton, 109.

PUBLIC LAND.

In an action to determine adverse claims, where both parties claim title through an unrecorded patent to land, but the records of the public land office disclosed that the patent has been issued, the fact that it has not been recorded cannot help plaintiffs.

—Quinn v. Johnson, 383.

A homestead entryman, in possession of his claim under a valid entry, is, except as between himself and the United States, the owner of all timber cut by him on the said claim, and need not, in an action for the

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PUBLIC LAND—Continued.

destruction by fire of timber so cut and piled on the said premises, allege and prove that the said timber was cut in good faith for the purpose of preparing the land for tillage.

—Babcock v. Canadian Northern Railway Co. 434.

RAILWAY.

CONVEYANCE OF RIGHT OF WAY.

The facts in this case are substantially like those presented in McCarthy v. St. Paul, M. & M. Ry. Co. 31 Minn. 278, 17 N. W. 616, and Radke v. Minneapolis & St. Louis Ry. Co. 41 Minn. 350, 43 N. W. 6, wherein it was held that the conveyance of a railroad right of way after the construction of the roadbed was in effect a grant and license to maintain the roadbed as then existing, and the decisions there rendered are followed and applied. The fact that the embankments involved in these cases affected the natural drainage, and did not obstruct the flow of water of a natural stream, as in the case at bar, is not a differentiating circumstance.

—Evans v. Northern Pacific Railway Co. 4.

RIGHT TO CROSS HIGHWAYS AND STREETS.

The legislature has power to grant authority to a railroad company to cross public highways and streets, and authority to construct a railroad between designated points implies authority to cross highways and streets which the railroad intersects. The legislature may require that a franchise be obtained from a city or village before a railroad company is permitted to cross streets in such city or village; but, in the absence of such requirement, a franchise from the city or its consent is not necessary.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14.

There is a well-recognized distinction between the right to cross a street and the right to occupy it longitudinally. The foregoing statement refers solely to the crossing of streets and highways by railroad tracks.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 16.

R. L. 1905, § 2841, construed, and *held*, following Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate, 101 Minn. 132, 112 N. W. 13, not to require a franchise to be obtained from a city or village before a railroad company constructs its tracks across streets in such city or village.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14.

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RAILWAY—Continued.

R. L. 1905, § 2916, construed, and *held* not to require such a franchise, or that there be an agreement between the city or village and the railway company as to the manner, terms, and conditions upon which a street may be crossed by the railroad.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 14.

TEMPORARY WAY OVER PRIVATE LAND.

Defendant, to facilitate public travel upon a highway over and across which it was constructing its railroad grade, in which work it completely and, as conceded, illegally obstructed the highway, voluntarily acquired from an adjoining landowner the right of passage over his land, and impliedly, if not expressly, invited the public to make use of the substituted way. It is *held* that defendant was under legal obligation to keep and maintain the way so provided in reasonably safe condition for public use.

—McCoy v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 38.

CONTRACT FOR USE OF BRIDGE OVER NAVIGABLE WATER.

An agreement, between the Northern Pacific Railway Company and the Wisconsin Central Railway Company, concerning the use by the latter of a certain railroad bridge, owned by the former, over the St. Louis river, a navigable stream, *held* supported by a sufficient consideration, notwithstanding that such bridge was constructed under an act of Congress providing that the owner of such bridge shall admit all other companies to the use thereof upon equal terms, upon the payment of reasonable compensation for such use, and subject to such conditions and regulations as to method of use, etc., as shall be fixed by agreement of the parties, or, in default of such agreement, by the Secretary of War.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 217.

Such agreement, though construed as a binding contract between the parties, *held* not contrary to the intent and purpose of such act of Congress, as tending to render the owner of the bridge incapable of complying with the mandate of the act as to the admission of all railroads to the use of such bridge upon equal terms, etc.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 217.

Such agreement construed, and *held* to be a contract which obligated the

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RAILWAY—Continued.

Wisconsin Central Railway Company to the payment of the rentals specified thereby, whether such company used the bridge or not.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 217.

An act of Congress authorizing the erection of a bridge over navigable waters provided that all railroad companies should have and be entitled to equal rights and privileges relative to the passage of railroad trains or cars over the same, upon payment of a reasonable compensation for such use. *Held:* Before any such use can be had, the owner of the bridge and the company desiring to use it must agree upon the compensation to be paid for such use and upon the rules and conditions to which each shall conform in using the bridge.

—Northern Pacific Railway Co. v. Wisconsin Central Railway Co. 226.

INJURY TO PERSON VISITING UNION STATION.

The tracks of defendant and another railway company cross in the city of Waseca at right angles, and in the angle thus formed is a passenger station used jointly by the two companies. A platform extends around the station and along the tracks of both companies. From the platform along defendant's tracks steps lead to a street crossing. Plaintiff, in returning from a visit to the station to inquire as to the time of trains and connections, was injured by the steps breaking as she attempted to walk down them. For many years these steps and defendant's platform had been used by the people of Waseca to reach the station, whether their business was with defendant or with the other company. It is *held:*

1. Whether plaintiff's purpose in visiting the station was to get information as to defendant's trains or as to the trains of the other company, defendant owed her the duty to use reasonable care to maintain the steps in a reasonably safe condition.
2. There was an implied invitation to the public to use defendant's platform and steps for such purposes.

—English v. Minneapolis & St. Louis Railroad Co. 131.

CARE REQUIRED OF EMPLOYEES IN SWITCH YARDS.

Employees in railroad yards, who are required to cross and go upon tracks where locomotives and cars constantly pass, must exercise care and vigilance commensurate with the grave dangers surrounding them. The care required by an employee of a railway company working in and about a switch yard depends on such a variety of facts and circum-

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RAILWAY—Continued.

stances, some of which may be in dispute, that rarely may it be said, as a matter of law, that contributory negligence exists.

—Torkelson v. Minneapolis & St. Louis Railroad Co. 76, 77.

Some work is such that the employee can give all his attention to his own safety in passing over tracks. In other work his attention must, in a greater or less degree, be engrossed on the particular matter in hand, and thereby diverted from approaching danger. When the use of the eye is demanded upon some particular item of work in a certain direction, we depend to a large extent upon the sense of hearing to apprise us of what may threaten from other directions. This is understood, and therefore the custom prevails of giving signals by sound, such as the ringing of a bell.

—Torkelson v. Minneapolis & St. Louis Railroad Co. 76.

INJURY AT HIGHWAY CROSSING.

As plaintiffs were attempting to cross defendant's tracks at a public highway with a threshing outfit, and while delayed on the crossing by the rails extending above the planking, a train ran into the outfit and caused damage thereto. In this action to recover for such damage, it is *held:*

1. Whether defendant was negligent in failing to maintain the rails of its track substantially level with the planking was a question for the jury, and the verdict is sustained by the evidence.
2. Whether plaintiffs were guilty of contributory negligence was a question of fact for the jury, and its decision of such question is sustained by the evidence.

—Belshan v. Illinois Central Railroad Co. 110.

Plaintiff's foot was caught and held in the space between the planking and a rail of defendant's tracks at a street crossing, and was run over by an engine. It is *held:*

1. Whether defendant should have filled or blocked the space underneath the ball of the rail was not primarily a problem in engineering for the solution of defendant's officers and engineers; but whether defendant was negligent in this respect was, on the evidence, a question of fact for the jury.
2. Whether the engineer, in charge of the engine that ran over plaintiff, used reasonable care to stop his engine after discovering that plaintiff's foot was caught, was a question for the jury, and the evidence was sufficient to sustain the verdict on this point.
3. There was no prejudicial error in the rulings on the trial.

—Gibson v. Chicago Great Western Railroad Co. 143.

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The complaint alleged substantially that the space between the planking and the rail was left unfilled, but did not charge that this was negligence. *Held:* An objection that the evidence should have been excluded, and the jury not permitted to base a verdict on negligence in this respect, was too technical and was not sustained.

—Gibson v. Chicago Great Western Railroad Co. 147.

In this action to recover for the death of plaintiff's intestate, claimed to have been caused by the negligence of defendant, it is *held*, that as to the negligence of defendant, the great speed of the train and the absence of signals clearly made a question for the jury.

—Simonson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 243.

It does not conclusively appear from the evidence that plaintiff's intestate was guilty of contributory negligence, and the trial court erred in entering judgment in favor of the defendant notwithstanding the verdict.

—Simonson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 243.

FIRE.

Evidence *held* sufficient to warrant finding of jury that the fire which caused the injuries sued for was set by the defendant's locomotive.

—Babcock v. Canadian Northern Railway Co. 434.

It being a matter of common knowledge that engines do emit sparks which start fires near the right of way, and there being no other apparent probable explanation of the origin of the fire, we think these facts rendered it highly probable that this fire was set from the passing engine and fully warranted the jury in so finding. This rule is so well established it cannot now be questioned. Laws 1909, p. 454, c. 378 (R. L. Supp. 1909, § 2041), to the effect that the liability of the railway company becomes absolute upon proof that it set the fire, does not change this rule.

—Babcock v. Canadian Northern Railway Co. 438, 439.

SALE.

Where personal property is sold upon the condition and reservation that title thereto shall not pass from the seller until the purchase price is paid in full, the seller, upon the default of the purchaser to make payment as required by the contract, has the election of one of three remedies: (1) he may reclaim the property; (2) he may treat the sale as absolute and sue to recover the debt; or (3) he may bring an action to foreclose his lien. But the assertion of either right is the abandonment of the other.

—Nelson v. International Harvester Co. 303.

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SALE—Continued.

When the property is retaken by the seller the contract is at an end, and no further rights thereunder exist against the purchaser. It operates as a rescission of the executory agreement to sell. In this respect it can make no difference from the standpoint of the law whether the seller reclaims the property as a matter of right and in virtue of the authority conferred by the contract, or by the voluntary return by the purchaser and acceptance by the vendor under agreement to discharge the debt.

—Nelson v. International Harvester Co. 303.

SEARCH AND SEIZURE.

The search warrant is not intended to notify the defendant of the particular offense with which he is charged, as is the warrant of arrest.

—Ingraham v. Booton, 109.

SPECIFIC PERFORMANCE.

It has been held that, in order to maintain an action for specific performance where an executory contract for the sale of lands has been entered into in the state where the land is, and subsequently the vendor leaves the state, the vendee is not bound to seek out the vendor in another country or distant state to make tender of the purchase price when due.

—Merritt v. Joyce, 238.

Held: The complaint in an action for specific performance of a contract to convey real estate did not state a cause of action for the relief asked or for any other relief. Plaintiff's "interest" in the land she was to convey to defendant was lost but not through any breach of the contract by defendant.

—Cohn v. Brinkmann, 538.

STATUTE.

In determining the constitutionality of an act of the legislature, every intendment must be indulged in favor of its validity.

—State ex rel. v. City of Mankato, 458.

In construing the constitutionality of a statute, courts will take judicial notice of all facts relevant to the question; that is, in this case, relevant to the classification.

—State v. Bridgeman & Russell Co. 188.

Laws 1895, p. 622, c. 248, does not change county lines by a special act, and the chapter does not violate section 33, art. 4, of the Constitution.

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STATUTE—Continued.

The boundary which had been floating and uncertain was not *changed* by making it fixed and definite.

—State ex rel. v. County of St. Louis, 42.

TITLE OF ACT.

It is sufficient if the title of a statute is fairly suggestive of its subject, and every fair doubt should be resolved in favor of its sufficiency. The title of the statute referred to is sufficient.

—State v. Bridgeman & Russell Co. 186.

The subject expressed in the title of an act was discrimination in the sale of certain commodities. The subject dealt with in the body of the act was discrimination in the purchase of the same commodities. *Held:* Purchase and sale are correlative terms, and there can be no sale without a purchase. If discrimination in the purchase of an article is prevented, there can be none in the sale.

—State v. Bridgeman & Russell Co. 191.

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STREET RAILWAY.

CITY ORDINANCE—MANDAMUS TO COMPANY.

Appeal from a judgment awarding a peremptory writ of mandamus to compel the St. Paul City Railway Company to construct and operate a street railway upon Maryland street, from Rice street to Como boulevard, pursuant to an ordinance of the city. *Held*, construing section 18 of Ordinance No. 1,227, that:

1. The city has, by its common council, the vested right to require the railway company to construct new lines of street railway.
2. Such right was not suspended or modified by sections 32 and 33 of chapter 4 of the home rule charter.
3. The ordinance requiring the construction of the new line is valid and compliance therewith may be enforced by mandamus.
4. Whether public interest or necessity requires the construction of any particular new line is one resting in the discretion of the common council, and its action cannot be interfered with by the courts, unless it is clearly an arbitrary one; and, further, that
5. The finding of the trial court that a public necessity exists for the new line, and that it is not a cross-town line, is sustained by the evidence.

—State ex rel. v. St. Paul City Railway Co. 316.

While section 18 of Ordinance No. 1,227, of the city of St. Paul, was not in and of itself a grant of a franchise, it is obvious that its purpose was to secure to the city rights which it did possess under the original ordinance. Upon its acceptance by the railway company it became a valid contract between the company and the city of St. Paul, whereby the city acquired the vested right to require the construction and op-

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eration of new lines as therein provided, and the legal obligation to comply with the requirement was assumed by the railway company.

—State ex rel. v. St. Paul City Railway Co. 321.

Whether public interest and necessity require the construction of a new line of railway upon any particular street upon which sewers have been constructed is a question resting in the discretion of the common council by virtue of section 18 of Ordinance No. 1,227. The court cannot interfere with the action of the council in ordering new lines, unless such action is clearly arbitrary.

—State ex rel. v. St. Paul City Railway Co. 316.

INJURY TO PEDESTRIAN.

Where it appears that a pedestrian, about to cross street railway tracks at a regular street crossing, looked twice after he left the curb toward the approaching car, but the night was dark, the speed of the car was unusually high, the noise on the rails as then laid not great, the headlight on the car was smaller and dimmer than ordinarily used on the cars there operated, the street was being paved with paving stones, and débris scattered around, the rails being raised six or seven inches from the concrete base, then partly laid, requiring attention to avoid the obstructions, it becomes a question for the jury whether such pedestrian, after he so looked and saw the car, was justified, in the exercise of ordinary care, to conclude that he could cross the track in safety.

—Bodin v. Duluth Street Railway Co. 513.

The finding that defendant ran the car at a negligently high speed and failed to give the usual warning of its approach is sustained by the evidence.

—Bodin v. Duluth Street Railway Co. 513.

INJURY TO PERSON USING TEMPORARY WAY ON PRIVATE LAND.

Action for personal injury. Verdict in favor of plaintiff. While using a temporary way on private property provided by defendant while the highway was illegally obstructed by the construction of its line of railway, plaintiff's horses took fright and threw the wheels of his wagon into a rut in the temporary way, upsetting the wagon and causing the injury complained of. *Held:*

1. The evidence supported the verdict.
2. The case went to the jury upon the question whether defendant was negligent in the maintenance of the temporary way, and the instructions, as a whole, presented the case properly to the jury.

—McCoy v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 38.

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OF LAND BID IN FOR THE STATE.

Where land has been bid in for the state upon a delinquent tax judgment sale, such land, as long as it has not been assigned by the state or redeemed, is not to be placed on the delinquent tax list for judgment and sale for subsequent delinquent taxes; and the presumption is that the officials followed the law in this regard till the contrary clearly appears.

—Forbes v. Stream, 484.

MONEY AND CREDITS.

Chapter 285, p. 397, Laws 1911, providing for the taxation of money and credits, *held* a complete revision of prior statutes upon the subject, and that it was designed by the legislature as the exclusive guide upon that subject, save as provisions of the general tax laws are therein referred to and called to the aid of the new statute, and to repeal by implication section 836, R. L. 1905, which provides for the deduction of debts from credits listed for taxation.

—State ex rel. v. Minnesota Tax Commission, 159.

The classification of money and credits for the purposes of taxation *held* not a violation of the amended Constitution.

—State ex rel. v. Minnesota Tax Commission, 159.

MORTGAGES.

Chapter 328, p. 448, Laws 1907 [R. L. Supp. 1909, §§ 1038–25 to 1038–33], construed, and *held*, that it was the intention to constitute all mortgages upon real estate a class for the purpose of taxation, and that a mortgage given to secure an indebtedness of $50 or less is within the operation of the law, and taxable thereunder. As so construed the law is constitutional.

—State ex rel. v. Fitzgerald, 192.

DELINQUENT TAX LIST—DESIGNATION OF NEWSPAPER.

Since the enactment of the statute the rule has been that some newspaper, as distinguished from the editor or publisher of a particular paper, though the paper be named, must be designated for the purpose of publishing the delinquent tax list, and the act of awarding the contract to the editor or publisher of a particular newspaper is not a compliance with the law.

—Foster v. Gage, 501.

Held, following Eastman v. Linn, 26 Minn. 215, 2 N. W. 693, and similar cases, that there was a failure properly to designate the newspaper in

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TAXATION—Continued.

which to publish the delinquent tax list in question in this action, and that the court acquired no jurisdiction to enter a judgment in the tax proceedings.

—Foster v. Gage, 499.

The failure to so designate the newspaper was not cured or remedied by section 12, Laws 1902 (R. L. 1905, § 914).

—Foster v. Gage, 499.

That statute was intended to remedy such defects and irregularities in the designation as were not necessarily fatal to the jurisdiction of the court; such as might without substantial prejudice to the rights of the property owner be corrected or disregarded. It was not intended to make a failure of compliance with the designation statute a mere irregularity or informality.

—Foster v. Gage, 499, 503.

REDEMPTION FROM SALE.

The evidence examined, and *held* to sustain the findings of the trial court that the amounts required to redeem from a tax sale were correctly stated in the notice of redemption.

—Forbes v. Stream, 484.

TRIAL.

No prejudicial errors appear in the instructions given, the refusal to give requests, or upon the rulings at the trial. Nor does it appear that the improper remarks of counsel, which the jury was fully admonished to disregard, resulted in prejudice to defendants.

—Carlton County Farmers Mutual Fire Insurance Co. v. Foley Brothers, 59.

ADMISSION OF EVIDENCE.

In an action to recover damages to horses shipped by plaintiffs over defendant's road, it was not error to receive in evidence a receipt for the horses by the consignee, which had written across the front a statement by a freight inspector of defendant that he had inspected the horses in the consignees' barn and found five horses with one swollen leg each, "apparently had rough handling of train in transit," against an objection that the evidence was immaterial and irrelevant. The objection was insufficient to raise the point that it was hearsay.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 37.

In an action to recover damages to horses, claimed to have been injured by defendant's negligence while they were in transit, it was not error

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MISCONDUCT OF ATTORNEY.

A claim of misconduct of counsel, relating to an alleged change of a figure in an exhibit, was for the trial court to determine.

—Cole v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 37.

Remarks of counsel, in his address to the jury, in reference to the power of this court to reverse the action of the jury, or reduce the verdict, and to its want of power to "make us take what they want to give us," *held* not to constitute prejudicial error.

—Landro v. Great Northern Railway Co. 306, 310.

VERDICT.

In the trial of an action for negligence, the legal definition of negligence and contributory negligence should be given to the jury, and then it is for the jury to decide whether the facts disclosed by the evidence do or do not bring the acts of the party charged with negligence or contributory negligence within such definition.

—Torkelson v. Minneapolis & St. Louis Railroad Co. 78.

TRUST.

If two or more are joint owners of an option to purchase land, and jointly interested in the venture of exploring it for mineral deposits and exercising the option to purchase the land if such deposits are found, each of such joint owners sustains a confidential and fiduciary relation to the others so jointly interested in the common venture, so that, if one of them obtains the title to the land within the time of the option, upon payment of a less sum than stated in the option, and with intention to defraud the others of their rights, and such others refrain from protecting the option by tender on his false assurance that the title was taken and is held in trust for them, equity will impress a trust in their favor upon the land.

—Merritt v. Joyce, 235.

VENDOR AND PURCHASER.

MARKETABLE TITLE.

In an action involving an executory contract for the sale of real property located in the state of North Dakota, the title to a part of which was acquired through a guardian's sale, it is *held* that the failure of the guardian to give the sale bond required by the statutes of that state justified the vendee in refusing the title as not marketable.

—Hubachek v. Maxbass Security Bank, 163.

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A title that may involve the purchaser in litigation to remove apparent or real defects appearing upon the face of the record is not one which the vendee will be compelled to accept. The question is, whether, without the aid of a specific decision, the title is so far free from doubt that a reasonable person, acting in good faith, would accept it.

—Hubachek v. Maxbass Security Bank, 169.

PERFORMANCE OF AGREEMENT.

The mere fact that the owner of land here, who has within this state given an option to sell, conveys the same during the life of the option to a resident of an adjoining state, whose residence and place of business therein is readily ascertained and easily accessible, does not extend the time within which the option must be exercised, nor waive the tender of the purchase price within the stated time.

—Merritt v. Joyce, 235.

It may well be conceded that the time of tender is waived or prolonged, where the giver of the option, to avoid its being consummated in a sale, secretes himself or goes to distant states or countries, so that it becomes impossible or impracticable for the holder, by tender of performance, to vitalize the option into a contract which equity will enforce.

—Merritt v. Joyce, 239.

LIABILITY FOR ACCRUING TAXES.

A deed, pursuant to a contract for the delivery thereof, dated December 22, 1906, was executed and tendered by the grantor, this plaintiff, to the grantee therein before the taxes for that year became due and payable. It was not then accepted, because the grantee objected to the title, but was left, at defendant's request, in a bank, which was to deliver it upon receipt of the purchase price. While so held and before delivery, the taxes became due. In this action, brought by the grantor, after delivery of the deed, for the balance of the purchase price, against the party to whom the grantor had contracted to deliver the same, *held*, such party cannot offset against the purchase price the taxes for 1906, paid by it without plaintiff's implied or express direction.

—Fritz v. O'Brien Land Co. 509.

SUBSEQUENT PURCHASERS.

In this action, involving the title to land, it is *held* the evidence sustains the finding that defendants purchased the land from the record owner of the title for a valuable consideration, in good faith, and without notice of certain unrecorded deeds.

—Quinn v. Johnson, 378.

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VENDOR AND PURCHASER—Continued.

Under R. L. 1905, § 3357, a subsequent purchaser in good faith for a valuable consideration, whose conveyance is first duly recorded, has the title as against a prior unrecorded conveyance, notwithstanding the fact that he purchases from the holder of an unrecorded deed from the record owner, and files for record this deed with that to himself, and thus completes the chain of title of record.

—Quinn v. Johnson, 378.

RECOVERY OF PURCHASE MONEY PAID.

Action to recover earnest money, paid on an executory contract for the purchase and sale of real estate, on the ground of fraud. The finding of fact that the plaintiff was induced to enter into the contract by the false and fraudulent representations of defendant, relied upon by plaintiff, who was deceived thereby, is the finding of an ultimate fact and necessarily includes all the essential elements of an actionable fraudulent representation. The finding is sufficient as to defendant's intent to deceive.

—Clark v. Thorpe Brothers, 202, 204.

The defendant cannot avoid the consequences of its fraudulent representations merely because the plaintiff might have consulted the official tax records. The findings of fact are sustained by the evidence. The court did not err in its rulings as to the admission of evidence.

—Clark v. Thorpe Brothers, 202.

Findings of fact herein, when construed with reference to the pleadings, are sufficient to sustain the conclusion of law that the plaintiff is entitled to judgment for the amount paid on the contract.

—Clark v. Thorpe Brothers, 202.

WATER AND WATERCOURSE.

Action to enjoin the defendant from discharging surface waters from his own land, by means of a ditch cut through a natural watershed on his own land, upon the land of the plaintiff, thereby unreasonably and unnecessarily damaging the plaintiff. *Held:*

1. A landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another, but in so doing he must use all reasonable means to avoid unnecessary injury to the land of others.
2. What is reasonable in such cases depends on the special facts of each particular case. The fact that the artificial drainage is not along the natural course of drainage, but through a watershed, is an important, but not a controlling, factor under all circumstances in determining the question of reasonable use.

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3. The findings of fact herein do not sustain the conclusion of law to the effect that the plaintiff is entitled to the relief prayed for.

—Rieck v. Schamanski, 25.

The rule of reasonable use declared in Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632, and followed in subsequent cases, was not modified by the decision in Erhard v. Wagner, 104 Minn. 258, 116 N. W. 577, so as to require that the drainage of surface waters must, under all circumstances, follow the natural line or course of drainage.

—Rieck v. Schamanski, 31, 32.

WILL.

In a strictly modern legal sense, the words "bequest" and "bequeath" are the appropriate terms for making a gift by will of personalty, and the word "devise" and "devise" for a gift of realty. But it is evident that the testator used the former words in their popular sense, and as applicable alike to a gift by will of property of any kind. Hence the word "bequest" in paragraph 21 of the will cannot be limited to gifts of personalty.

—Baldwin v. Zien, 184.

UNDUE INFLUENCE.

Requested instruction as to admissibility of declarations of testator upon an issue of undue influence *held* properly refused, as being ambiguous and misleading. It is undoubtedly true that the declarations of a testator are not evidence of undue influence and cannot be used to establish that fact.

—Burmeister v. Gust, 247.

Instruction that certain facts and circumstances, which, at most, constituted mere evidence to be considered on the issue, raised a presumption of undue influence in the execution of a will *held* erroneous.

—Burmeister v. Gust, 247, 255.

CONSTRUCTION.

A testator by his will gave to his wife a legacy of $5,000, a devise of a leasehold interest for life, and the remainder thereof to his brother, and made a number of other legacies. The district court, on appeal from the probate court, made its order directing a sale of the real estate, and the order in which it should be sold, and the application of the rents from the leasehold estate. Will construed, and *held*, that it was not error to omit from the sale the homestead, nor to include in the sale land contiguous thereto, but not a part of it, nor to direct a sale of the remainder of the leasehold estate before the sale of the life

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WILL—Continued.

estate, nor to direct that advances made to the widow and taxes paid by the executors on the leasehold estate be repaid out of the rents of the leasehold estate.

—Baldwin v. Zien, 178.

If a will contains distinct and independent provisions, some of which are valid and others invalid, effect must be given to the valid ones, and there is an intestacy only as to that part of the estate affected by the invalid ones; but when the several provisions of the will are so dependent upon and connected with each other that they cannot be separated, without defeating the general intent of the testator, they are all void, and there is a total intestacy.

—Bemis v. Northwestern Trust Co. 409, 414.

The testator herein gave three funds to the appellant herein, in trust to pay the annual income therefrom to each of his three sons during his life, and at his death to pay two-thirds of the fund held for his benefit to the trustees of a home for aged men and women, which the testator attempted by his will to found and endow; but the provisions as to the proposed home are invalid. *Held*, that the provisions for the benefit of the sons were not so connected with and dependent upon those for the home that they must also fail.

—Bemis v. Northwestern Trust Co. 409.

DEVISE—LIFE TENANT LIABLE FOR TAXES.

As between the life tenant and the remainderman, taxes on real estate devised by the testator, which were due at his death, must be carried by the life estate.

—Baldwin v. Zien, 186.

FAMILY SETTLEMENT.

An agreement on the part of a brother of a deceased person with another brother and sister to refrain from contesting the will of decedent in consideration of the promise of the latter, beneficiaries named in the will, to pay to him a certain sum of money, is not a "family settlement," within the meaning of the law upon that subject. The mere fact that the parties are related, that relation being brother and sister, does not necessarily make them members of a "family," within the meaning of the law of family settlements.

—Montgomery v. Grenier, 416, 419.

The doctrine of "family settlements" is predicated upon the family relation, and upon the fact that mutual rights and good faith controversies are, in the interests of family harmony, best settled and adjusted at

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WILL—Continued.

the home, rather than in the courts, and for that reason are sustained, where no fraud or mistake is shown.

—Montgomery v. Grenier, 418.

To sustain a compromise and settlement it must appear that the claim or controversy settled, though perhaps not in fact valid in law, was presented and demanded in good faith and upon reasonable grounds for inducing the belief that it was enforceable. Neibles v. Minneapolis & St. L. Ry. Co. 37 Minn. 151, 33 N. W. 332.

—Montgomery v. Grenier, 419.

APPEAL FROM PROBATE COURT BY AGGRIEVED PARTY.

Under R. L. §§ 3872, 3873, providing that an appeal may be taken from an order of the probate court admitting a will to probate, or denying the same, "by any party aggrieved," an executor, propounding a will by which he is nominated, may appeal from an order denying probate thereof.

—Burmeister v. Gust, 247.

WITNESS.

In cases where deceit and underhanded doings are the charge, if it be true, it is generally found difficult of proof, especially by direct evidence. Hence inferences of great weight may be drawn from the conduct of the adverse parties and the ease with which their memories fail them when called by the opposite side for cross-examination.

—Merritt v. Joyce, 242.

An executor, propounding a will by which he is nominated, is not, as such, incompetent, under R. L. § 4663, to testify as to conversations with the testator concerning the will.

—Burmeister v. Gust, 247.

It was not reversible error for plaintiff, in a personal injury action, to show, over the objection of defendant, that a witness for defendant gave testimony contrary to previous statements made by him when testifying as a witness for plaintiff.

—La Pray v. Lavoris Chemical Co. 158.

CROSS-EXAMINATION.

Action to recover earnest money paid on an executory contract for the purchase and sale of real estate. Plaintiff testified on cross-examination that the representation concerning the amount of taxes was an important part of his buying the property. The question why he did not have a guaranty in his contract was then asked, but excluded. *Held:* The ruling was not an abuse of judicial discretion.

—Clark v. Thorpe Brothers, 205.

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WORDS AND PHRASES.

The words "*in or upon*," as used in R. L. 1905, § 2841, refer to a longitudinal occupation of a street or alley by a railroad track, and not to a crossing of the street or alley.

—City of International Falls v. Minnesota, Dakota & Western Railway Co. 17.

A deed is "made" or "given," in the commonly accepted meaning of the words, when it is delivered, not when it is recorded.

—Underleak v. Scott, 140.

"Marketable title," as applied to real property, is one that is free from reasonable doubt; one that a prudent person, with full knowledge of all the facts, would be willing to accept.

—Hubachek v. Maxbass Security Bank, 169.

"Probable cause" for the commencement of a civil action consists in such facts and circumstances as will warrant a cautious, reasonable, and prudent man in the honest belief that his action and the means taken in prosecution of it are just, legal, and proper.

—Nelson v. International Harvester Company, 301.

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